[fol. 16] Petitioner, in support of its claim hereinafter made that the said assessments of sales and Use Taxes against it are incorrect, respectfully shows the following facts:

The alleged sales Taxes assessed and the payment of which is demanded, are based upon the Petitioner's earnings for gathering and transporting crude oil from oil fields within the State of Mississippi where there were no trunk pipe line facilities for the transportation of said oil and where the oil was transported from lease tanks in the fields through short gathering lines direct to tank cars or to loading racks situated on railroad lines.

Petitioner's methods of operation in the gathering and transportation of such crude oil within the State of Mississippi began about December 1943, when Petitioner purchased from Allied Pipe Line corporation a gathering line system and tank car loading rack on the Illinois Central Railroad near the Pickens Field in Yazoo County. A gathering system was installed in the Cranfield Field, Adams County, in the latter part of the Year 1943 with lines leading to a railroad loading rack on the Mississippi Central Railroad at Noble in the vicinity of the field. Early in 1944 gathering line facilities were installed in the Eucutta and Heidelberg fields (Wayne and Jasper Counties) with loading racks at Hiwanee on the G. M. & O. Railroad and at Heidelberg on the Southern Railway to load crude oil from the respective fields. Temporary loading racks were constructed in 1944 and used to load small quantitites of crude oil gathered from the Gwinville and Mallalieu Fields.

In November, 1944, a trunk line was completed from the Cranfield Field to Gibson Landing on the West Bank of the Mississippi River, and oil from Cranfield which had previously been shipped by rail was moved out of the State by trunk line and loaded aboard barges at Gibson Landing. The railroad loading was then abandoned. In 1945 a 12" trunk line was constructed from Maryland Tank Farm of Standard Oil Company of New Jersey, near Baton Rouge, [fol. 17] Louisiana, north to a point near Liberty, Mississippi; from whence an 8" line was built to connect with the Cranfield-Gibson Landing trunk line system and a 10" line was built from Liberty northeastward to the Mallalieu Field in Lincoln County. This line was later extended to the Gwinville Field in Jefferson Davis County. Upon completion of

the Baton Rouge-Cranfield line in August, 1945, the Cranfield crude Oil which had previously moved west to the Mississippi River was moved south by pipe line to Baton Rouge. Upon completion of the trunk line connection, the loading rack for Mallalieu crude oil at Brookhaven was abandoned in August, 1945, and the rack for Gwinville crude oil at New Hebron was abandoned in January, 1946. In April, 1946, a line was constructed from the Eucutta Field to Heidelberg, and the Hiwanee loading rack was abandoned, although this rack has not yet been dismantled.

The gathering system in each of the fields, which are the sources of the various items of taxes above set forth, consists of lines of pipe extending from a central, or main, line connected with lease tanks which are located in the vicinity of oil wells on the various producing leases. As each respective oil field developes, the gathering system necessarily expands and lines are extended to other wells and lease tanks. The gathering system which was first in use in the various fields where in oil was transported from the lease tanks to loading racks and through to tank cars was a mere temporary expedient, and by reason of subsequent development trunk pipe lines have been laid within the state and used in replacing the said loading racks with the exception of Pickens and Heidelberg-Eucutta Fields where the develoopment has not yet been deemed sufficient to justify the extension of the said trunk pipe lines into said fields. The loading rack consists of a main pipe, or header, lying in or on top of the ground parallel to a railroad spur, with smaller perpendicular lines welded thereto extending upward to the loading rack walkway. On top of these perpendicular lines are movable connecting joints, so placed as to fit the [fol. 18] intake valves of tank cars on the adjacent spur track. In some instances small working tanks are constructed in connection with the loading racks to provide for accumulation of oil until tank cars for shipment have been spotted by the railroad. In some cases where production from a field is small, and in other cases in order to conserve tank space and to eliminate double pumping, the oil may be pumped directly from the lease tanks into tank cars.

Petitioner also charges that all of the said personal property for which Use Tax is alleged to be due as above set forth is used in and about the operations which are herein outlined for the gathering and transportation of crude oil.

Petitioner respectfully represents that neither the said

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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1948

No. 287

INTERSTATE OIL PIPE LINE COMPANY,
APPELLANT,

vs.

A. H. STONE, CHAIRMAN STATE TAX
COMMISSION

APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSISSIPPI

FILED SEPTEMBER 18, 1948.

Sales Tax nor Use Tax assessed against it as above set forth is due nor should be collected for the reason that the Petitioner's operations in the gathering and transporting of crude oil from the producing leases in each of the oil fields is solely interstate commerce, and the tangible property against which Use Tax has been assessed is used solely in said interstate transportation of oil and is, therefore, used and consumed in the furtherance of interstate transportation or interstate commerce.

All oil which it gathers in the State of Mississippi is consigned for shipment to destinations outside the state, either by trunk pipe line, if available, or by railroad tank car. The gathering and transportation, where trunk line facilities are available, and the gathering and loading aboard tank cars, are covered by interstate tariffs which are regularly published and filed with the Interstate Commerce Commission. All oil gathered and loaded aboard tank cars is tendered for shipment by the owner or purchaser at the lease tanks in the producing fields. The tender of shipment specifies the quantity of oil to be moved, the origin and ultimate destination, and the tariff under which the shipment is made. It also contains shipping instructions as to consignee, destination, route of shipment, etc. Repre- [fol. 19] sentatives of the producer or shipper, gauge the oil in the lease tanks, run out the quantity designated, then again gauge the lease tanks and jointly sign the "Run Ticket" showing opening and closing gauges from which the quantity shipped is computed. The oil is then pumped into the main gathering line and thence to the loading rack. When tank cars for the shipment have been spotted at the loading rack, they are loaded and representatives of Petitioner obtain from the railroad the bill of lading and other shipping papers covering the shipment, showing the consignor of the oil as shipper, with Petitioner shown as agent of the shipper, and indicating thereon the designation previously specified by the shipper. For its services in gathering and loading the crude oil, Petitioner bills the shipper at the rate per barrel stipulated in its applicable I. C. C. Tariff.

Petitioner says that his gross income from its gathering and transporting of crude oil for which the alleged sales tax has been assessed is derived solely from interstate commerce and is exempt from the sales tax under Section 10109 Mississippi Code of 1942, which we quote as follows:

SUPREME COURT OF THE UNITED STATES

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INTERSTATE OIL PIPE LINE COMPANY,
APPELLANT,

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"There shall be excepted from the gross income used in determining the measure of the tax imposed in this Section so much thereof as is derived from business conducted in commerce between this State and other States of the United States, or between this State and foreign countries which the State of Mississippi is prohibited from taxing under the Constitution of the United States of America."

Petitioner charges that the Use Tax assessed against Petitioner as above set forth on the use of tangible personal property which is a necessary part of the Petitioner's gathering and transportation system and which is used and consumed in the furtherance of interstate commerce, is exempt by virtue of Section 10149, 1942 Code of Mississippi, which we quote as follows:

"On the use, storage, or consumption of tangible [fol. 20] personal property used or to be used or consumed in the furtherance of interstate transportation or interstate commerce, or on the use, storage or consumption of any property owned, used or to be used or consumed which is not procurable in the ordinary channels of trade in the state of Mississippi."

Petitioner further charges that not only are the Sales and Use Taxes assessed against it incorrect, because they come within the statutory exceptions as set out in the laws of the State of Mississippi as above quoted, but that said taxes are not assessable or collectable for the reason that all of the said operations by Petitioner, within the State of Mississippi, are in fact interstate commerce, and any alleged sales tax on its earnings from gathering and transporting of crude oil within the state and use, or compensating taxes against the tangible property used in connection therewith, are in violation of the commerce clauses of the Constitution of the United States, Article One, Section Eight, and both taxes are in effect a regulation of and a burden on interstate commerce.

Therefore, Petitioner presents this written petition within ten days from the date of the registered notice of the assessment of Sales and use Taxes at issue herein and prays that this petition may be properly files, and in response thereto, may the Commissioner grant a hearing on this petition, as provided by statutes applicable in such cases, at

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such time and place as may be hereafter designated by the Commissioner, and may the Commissioner fully investigate the questions herein set out before proceeding further with the alleged assessment or the collection of the said Sales and Use Taxes against this Petitioner.

Respectfully submitted, Alexander and Alexander, by Jas. A. Alexander, Walter D. Davis, P. H. Hunter.

[fol. a] [Caption omitted]

[fol. 1]

IN THE CIRCUIT COURT OF THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY, MISSISSIPPI

No. 11941

INTERSTATE OIL PIPE LINE CO.

vs.

A. H. STONE, Chairman of State Tax Commission

DECLARATION—Filed April 4, 1947

Comes Interstate Oil Pipe Line Company, Plaintiff, and brings this suit against A. H. Stone, Chairman of the State Tax Commission of the State of Mississippi, and Commissioner of Sales and Compensating Taxes, who is a resident and citizen of the State of Mississippi in the City of Jackson, First District of Hinds County and for cause of action says:

I

Plaintiff, Interstate Oil Pipe Line Company, is a corporation organized and existing under and by virtue of the laws of the State of Delaware, is duly qualified as a foreign corporation to do business in the State of Mississippi, and maintains in the City of Jackson, Hinds County, Mississippi, its principal Mississippi office in charge of its duly designated agent for service of process.

Defendant, A. H. Stone, is the duly and legally elected, qualified and acting chairman of the State Tax Commission of Mississippi, and is the official and legally designated commissioner for the collection of sales taxes and compensating, or use, taxes in the State of Mississippi. The defendant's office is in the State Capitol in the said City of Jackson, Mississippi, and he holds his said office and official position under and by virtue of the laws of the State of Mississippi.

II

Plaintiff, Interstate Oil Pipe Line Company, is a common carrier engaged only in the business of gathering and transporting crude oil for various shippers for hire, and is an

[fol. 2] interstate carrier operating under the jurisdiction of the Interstate Commerce Commission; and all of its transportation of oil in Mississippi is covered by tariffs which are regularly published and files with the said Interstate Commerce Commission. Said tariffs specifically provide that plaintiff will only receive oil for transportation when said oil is consigned for shipment to points outside the State of Mississippi.

III

All oil which plaintiff gathers and transports within the State of Mississippi is tendered to it for shipment by the owners or purchasers of the said crude oil at the lease tanks which are located at or near the oil wells in the various oil producing fields within this State.

All oil which plaintiff thus gathers within the State of Mississippi for transportation is consigned for shipment to destinations outside of the State either by trunk pipe line, or by railroad tank cars. Crude oil is a lawful article of commerce, and in the transportation of said oil plaintiff operates oil pipe-lines, called gathering lines, some of which lines run from the lease tanks situated at or near producing wells in the various fields to railroad tracks, where the oil is flowed into tank cars for shipment, while other gathering lines run from lease tanks into other pipe lines, designated as trunk pipe lines, which carry the oil across the State and out of the State and into the State of Louisiana. Oil gathered and transported through said trunk pipe lines is in continuous transit and without interruption in interstate commerce. The oil which is transported from the lease tanks to the various railroads for shipment by tank cars is likewise transported in continuous transit in interstate commerce, as more fully hereafter set out.

IV

The gathering system in each of the fields consists of lines [fol. 3] of pipe extending from a central or main line to lease tanks which are located in the immediate vicinity of oil wells on various producing leases. As the oil field develops this gathering system expands, and lines are extended to lease tanks serving new wells. Some of these gathering system lead into trunk pipe lines which traverse the State, while others lead to loading racks at points on railroads.

The transportation and handling of said oil through said gathering lines to the said railroad loading racks and thence into tank cars only begins when said oil is to be shipped or transported out of the State, in interstate commerce. In all cases of such transportation there is a continuous movement of said oil from the said lease tanks to the ultimate out-of-state destination.

V

The defendant, by C. R. Gartin, Chief of Sales and Use Tax Division, under notice of December 10, 1946, made a proposed assessment against the plaintiff, alleging that the said plaintiff owed sales taxes for the years 1944, 1945 and for the period from January 1 to June 30, 1946, aggregating $20,296.36; and a proposed assessment was made against plaintiff for compensating, or use, taxes for the same period of time and which were included in said notice aggregating $5,030.27, making a total of sales and use taxes demanded by defendant of $25,326.63.

VI

The defendant made said proposed assessment under the alleged authority of Title 40, Chapter 3, Divisions 1 and 3, of the 1942 Code of Mississippi, officially designated as the Emergency Revenue Act of 1934, also known as the General Sales Tax Law, and the Use or Compensating Tax Law. Under the said laws the defendant has been exclusively vested with the legal authority for the enforcement of the provisions of the said laws and the assessment and collection of said sales taxes and use taxes.

VII

The plaintiff thereafter on December 18, 1946, within the [fol. 4] period of time authorized by law, filed its petition with the State Tax Commission of the State of Mississippi, wherein it applied for a hearing before said Tax Commission for the purpose of correcting or setting aside the said taxes assessed against it by the Defendant Commissioner. Thereafter a hearing was had before the State Tax Commission on the plaintiff's said petition on the 30th day of January, 1947, in the office of the Tax Commission, the said date for hearing having been agreed on between the parties, and on March 10, 1946 the said Tax Commission entered its order sustaining the said assessment of sales taxes and use

taxes against the Plaintiff, Interstate Oil Pipe Line Company, in the amounts as above set forth, aggregating $25,326.63. In its said order the Commission held that the gross income from gathering and transporting crude oil from lease tanks to railroads and loading aboard tank cars for shipment by railroad outside the State is derived from intrastate commerce and held that said income is subject to the sales tax and that material used in the construction and operation of such lines is subject to the compensating or use tax. However, it held that gross income from gathering and transporting crude oil from lease tanks to trunk pipe line systems and its transportation by said trunk pipe line systems to points outside the State is derived from interstate commerce and is not subject *ot* the sales tax and the material used therein is not subject *ot* the use tax. A certified transcript of the proceedings which were had by and before the defendant and State Tax Commission in connection with the said assessments and hearing is herewith filed as Exhibit 1 to this declaration and prayed to be taken as a part thereof. The Exhibits, A, B, C and D of the said petition filed with the State Tax Commission and constituting a part of Exhibit 1 show in detail the said sales and use taxes, which said Tax Commissioner and Tax Commission found to be due by Plaintiff, subject to an admittedly proper deduction thereafter made of $222.57.

[fol. 5] VIII

Plaintiff has exhausted its administrative remedy as provided by Title 40, Chapter 3 of the Mississippi Code of 1942, and plaintiff has now availed itself of the right to resort to this Court of law to recover from the Defendant Commissioner the said taxes. To prevent itself from suffering the severe penalties as provided by the laws for non-payment of said taxes, Plaintiff has paid to defendant the amount wrongly found to be due by the State Tax Commission as above set forth, aggregating $25,326.63, and upon making said payment the Plaintiff gave notice of Plaintiff's intention to immediately enter suit against the Defendant in the proper Court for the recovery of said payment, according to the laws of Mississippi. A true copy of the transmittal letter addressed to the defendant by Plaintiff in making the said payment is herewith attached as Exhibit 2, and the receipt from the State Tax Commission for said payment is

attached as Exhibit 3, and praped to be made a part hereof as fully as if incorporated herein.

IX

The business and activities of the Plaintiff in Mississippi are wholly and exclusively in interstate commerce. The said sales taxes, which have been assessed against Plaintiff and which have been paid under protest, and for which this suit is brought as above set forth, are based upon Plaintiff's gross income from performing the following services, to-wit: Gathering and transporting crude oil from lease tanks in certain oil fields in the State of Mississippi to points on railroads in Mississippi, and there loading said crude oil into tank cars, following which said tank cars were conveyed by the railroads to destinations outside the State of Mississippi, the whole being a continuous and uninterrupted movement in interstate commerce.

Plaintiff alleges that all of the said personal property for w which use taxes have been demanded and which have been paid under protest, and for which recovery is sought in this suit, is used in and about the operations, which are herein [fol. 6] outlines, for the gathering and transportation of crude oil, for which the sales taxes have been demanded as herein set forth.

X

The Plaintiff states that it alone has borne the burden of the taxes herein sued for and has not directly or indirectly collected said taxes or any part thereof from its customers. Plaintiff is therefore entitled in justice and good conscience to a refund or recovery of said taxes as herein prayed for, and is therefore the real and only party in interest in this suit.

XI

Plaintiff is engaged wholly and eexclusively in interstate commerce in the State of Mississippi, and is exempt from the alleged and purported assessment against it for said sales taxes by virtue of the special provisions of Section 10109, said Mississippi Code of 1942, a part of which is quoted as follows:

"There shall be excepted from the gross income used in determining the measure of the tax imposed in this

section so much thereof as is derived from business conducted in commerce between this State and other States of the United States or between this State and foreign countries which the State of Mississippi is prohibited from taxing under the Constitution of the United States of America."

XII

Plaintiff charges that the compensating or use taxes assessed against it as above set forth on the use of tangible personal property which is a necessary part of Plaintiff's gathering and transportation system, and which is used and consumed in the furtherance of interstate commerce, is exempt by virtue of the special provision of Section 10149, 1942 Code of Mississippi, a part of which we quote as follows:

[fol. 7] "On the use, storage, or consumption of tangible personal property used or to be used or consumed in the furtherance of interstate transportation or interstate commerce, or on the use, storage or consumption of any property owned, used or to be used or consumed which is not procurable in the ordinary channels of trade in the state of Mississippi."

XIII

Plaintiff says that not only are the said sales and use taxes assessed against it incorrect because they come within the statutory exemptions as set out above, but that said taxes are not assessable or collectible for the reason that all of Plaintiff's operations within the State of Mississippi are in fact interstate commerce. That the alleged sales taxes on its gross income from the transportation of crude oil within the State and the use of compensating taxes against the tangible personal property used in connection therewith are in violation of the Commerce Clause of the Constitution of the United States, Article 1, Section 8, Clause 3. That the said assessments against Plaintiff also are invalid and void because they contravene Article 14, or the Fourteenth Amendment to the Constitution of the United States, and also contravene Section 14 of the Constitution of the State of Mississippi and also Section 112 of the Constitution of the State of Mississippi.

XIV

Plaintiff charges that if the said General Sales Tax law and Compensating or Use Tax Law, which are incorporated in Title 40, Chapter 3, Vol. 7 of the 1942 Code of Mississippi, as amended by Chapter 262 of the General Laws of Mississippi for 1946, House Bill No. 311, are applicable to Plaintiff in the levy of the said sales taxes and use taxes, the said laws are void and of no effect because:

[fol. 8] A. The said taxes, if applied against the Plaintiff under the facts as herein set forth, impose a license on interstate commerce.

B. The imposition of such taxes places a burden on Plaintiff's privilege of carrying on interstate commerce.

C. The imposition of such taxes constitutes a direct burden on the transportation of crude oil, a lawful article of commerce, wholly and exclusively in interstate commerce.

D. The imposition os such taxes against the Plaintiff is a tax directly on interstate commerce, or on the privileges or right to engage wholly and exclusively in interstate commerce.

E. The imposition of such taxes against the plaintiff is an attempted regulation of interstate commerce.

F. The imposition of such taxes against the Plaintiff is an attempt to usurp the powers which have been delegated to the Congress of the United States by the Constitution of the United States.

XV

Plaintiff herewith charges that neither the said sales taxes nor use taxes which have been assessed against it is above set forth, and which have been paid under protest, and refund of which is demanded in this suit, are due, nor should have been Collected, or should now be retained by the State of Mississippi, for the reason that Plaintiff's operations in the gathering and transporting of said crude oil from the producing leases to the loading racks on the railroad and the loading into the railroad tank cars for continuous transportation out of this State is interstate transportation, or interstate commerce. That the tangible property used in connection with, or for the purpose of, said interstate trans-

portation of crude oil is therefore used and consumed in the furtherance of interstate commerce. All oil gathered by the Plaintiff in the State of Mississippi is consigned for shipment to destinations outside of the State, and the gather-
[fol. 9] ing and loading aboard tank cars of such crude oil are covered by interstate tariffs, which are regularly filed by the Plaintiff with the Interstate Commerce Commission.

XVI.

That for the reasons above set forth the Plaintiff has been improperly charged with said sales taxes and use taxes and required to pay the same, and under the law of the State may recover the amount paid, together with interest in a proper action or suit against the Defendant Commissioner, and to this end, Plaintiff invokes the jurisdiction of this Circuit Court and states that the Defendant owes the Plaintiff the said amount which the plaintiff has heretofore paid for said sales taxes and use taxes above set forth amounting to $25,326.63, and for which amount the Plaintiff has made demand of the defendant, which Defendant has refused to pay and continues to refuse to do so.

Wherefore, Plaintiff brings this suit and demands judgment against the Defendant for the full sum of $25,326.63, with interest and costs.

P. H. Hunter, J. L. Seger, Walter D. Davis; Jas A. Alexander, Attorneys for Plaintiff.

[fol. 10]: EXHIBIT 1 TO DECLARATION

Jackson, Mississippi,
December 10, 1946.

Interstate Oil Pipe Line Company, National Bank of Tulsa Building, Tulsa 2, Oklahoma.

Attention: Mr. P. H. Hunter.

GENTLEMEN:

Thank you for your letter of December 4th which was written in response to our letter of November 25th and which had further reference to the assessment of sales and use taxes made by our auditors.

We are still unable to agree with your conclusion that the materials used in constructing your telephone lines are exempt from the provisions of our Use Tax Law. Since the figures shown in our audit reports as adjusted by the changes agreed to in our letter of November 25th appear to represent the correct amount of tax involved as agreed in your letter of December 4th, we believe that it is now proper that we make final determination based on these figures and to make the assessment final. We are therefore enclosing copies of these final assessments, and this letter is sent to you under registered mail in order to comply with the provisions of the law which require that you be given registered notice and demand to pay this tax within ten days from the date of this registered letter.

We are setting out below the periods covered by these assessments and the amounts shown due for each of these periods:

Sales tax calendar year 1944	$ 4,510.99	
Sales tax calendar year 1945	10,262.48	
Sales tax January 1 to June 30, 1946	5,522.89	$20,296.36
Use tax Calendar year 1944	1,017.84	
Use tax calendar year 1945	3,532.12	
Use tax January 1 to June 30, 1946	480.31	5,030.27
Total sales and use tax		$25,326.63

[fol. 11] You expressed a desire that this matter might be expedited as soon as possible. We agree that this should be done. In order that there may be no further delay, we suggest that you forward your remittance for the amount of these assessments so that you may be in position to enter suit for refund of the amount of taxes paid and thereby bring the matter before the courts for review.

[fol. 12] We understand that any suit brought by you to recover payment of these taxes will be brought in a friendly spirit. We assure you that we feel the same way about it. It is always a matter of regret when we are unable to agree with our friends in the matter of their tax liability. It is entirely proper when these disagreements arise that the matter be brough- before a court of competent jurisdiction

so that we may all know how to handle such matters in the future.

Sincerely, C. R. Gartin, Chief, Sales & Use Tax Division.

CAG:Mc.

Encls.

cc: Mr. Walter D. Davis, Millsaps Building, Jackson, Mississippi; Alexander and Alexander, Capitol National Bank Building, Jackson, Mississippi.

[fol. 13] PETITION BY INTERSTATE OIL PIPELINE COMPANY FOR HEARING IN RESPONSE TO ALLEGED INCORRECT ASSESSMENT OF SALES TAX AND USE TAX

To the Honorable A. H. Stone, Chairman of State Tax Commission of the State of Mississippi, and Commissioner in Charge of Administration of Sales Taxes and Use Taxes Within the State of Mississippi:

The petition of Interstate Oil Pipe Line Company, hereafter referred to as "Petitioner", respectfully represents:

Under date of December 10th, 1946, Petitioner was assessed with Sales Tax and Use Tax, as set in the registered notice of said assessment from C. R. Gartin, Chief, Sales and Use Tax Division, and which assessments are therein stated to be:

Sales Tax calendar year 1944	$ 4,510.99	
Sales tax calendar year 1945	10,262.48	
Sales tax January 1 to June 30, 1946	5,522.89	$20,296.36
Use tax calendar year 1944	1,017.84	
Use tax calendar year —	3,532.12	
use tax January 1 to June 30, 1946	480.31	5,030.27
Total sales and use tax		$25,326.63

In response to said assessment, Petitioner herewith files this petition in writing alleging that the said returns and assessments are incorrect, and the alleged taxes are not due, and it herewith respectfully asks that the Commissioner shall grant a hearing on this petition and investigate the question

[fol. 14] fully before proceeding further, and in support of which Petitioner alleges:

The Petitioner, Interstate Oil Pipe Line Company, is a Corporation chartered under the laws of the State of Delaware and duly qualified as a foreign corporation to do business in the State of Mississippi, and is a common carrier engaged in the business of transporting crude oil for various [fol. 15] shippers for hire. Petitioner does not purchase crude oil within the State of Mississippi, and, therefore, all oil which it gathers within the State of Mississippi is tendered for shipment by owners or purchasers of the said crude oil at the lease tanks in the various producing fields within the State. All oil which Petitioner gathers in the State of Mississippi is consigned for shipment to destinations outside of the State, either by trunk pipe line, if available, or by railroad tank car. The gathering and transportation of such oil, either by trunk pipe line where the same is available, or by gathering and loading said oil aboard tank cars, is solely and entirely interstate commerce. Petitioner is, therefore, an interstate carrier, duly licensed by the Interstate Commerce Commission, and all of its transportation of oil is covered by interstate tariffs which are regularly published and filed with the said Interstate Commerce Commission.

At the present time all oil being gathered by Petitioner in the State of Mississippi is now moving out of this state by trunk pipe line except oil transported from Pickens and Heidelberg-Eucutta Fields. The assessment of the sales tax by Commissioner against Petitioner as above set forth, aggregating a total of $20,296.36, represents taxes which are alleged to be due by Petitioner on the gross transportation income collected by Petitioner for transporting oil at the following times and places as shown by the itemized statements attached hereto as Exhibits A and B.

The assessment of the Use Tax as above set forth, aggregating $5,030.27, is alleged to cover taxes due by Petitioner on tangible personal property acquired and used within this State for the time at the following places, as shown by itemized statements of invoices covering said personal property as shown by Exhibits B and C hereto. The amount of Use Tax shown by said statements, however, has been reduced to $5,030.27, by an admittedly proper deduction of $222.57.

[fol. 21]

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SUBSTITUTED BY AGREEMENT IN LIEU OF EXHIBITS "A", "B", "C", AND "D" ATTACHED TO ORIGINAL PETITION

INTERSTATE OIL PIPE LINE COMPANY

	Sales Tax Due Intrastate				Use Tax Based on Delivery Point			
	1944	1945	1/1–6/30/46	Total	1944	1945 1/1–6/30/46	Total	
Cranfield	$ 444.76	766.08	.....	1,210.84	(34.54)	$ .51	$ (34.03)	Refund
Pickens	2,073.47	2,144.50	924.50	5,142.47	220.62	102.12	322.74	
Eucutta	568.38	3,958.92	2,355.29	6,882.59	132.65	426.30	558.95	
Heidelberg	1,417.43	3,223.04	2,233.61	6,874.08	1,949.43	2,278.44	4,227.92	
Mallalieu	6.95	30.51	.....	37.46	—0—	14.96	14.96	
Gwinville	.....	139.43	9.49	148.92	—0—	.3	.03	
Waynesboro	.....	.....	.....	.....	173.13	.97	174.10	
Noble	.....	.....	.....	.....	40.82	.06	40.88	
Hiawanee	.....	.....	.....	.....	36.31	3.06	39.39	
Jackson	.....	.....	.....	.....	1.18	—0—	1.18	
Lagrange	.....	.....	.....	.....	.....	3.11	3.11	
Fayette	.....	.....	.....	.....	.....	3.35	3.35	
McComb	.....	.....	.....	.....	.....	10.69	10.69	
Washington	.....	.....	.....	.....	.....	1.56	1.56	
Brookhaven	.....	.....	.....	.....	.....	993.52	993.52	
New Hebron	.....	.....	.....	.....	.....	156.79	156.79	
Laurel	.....	.....	.....	.....	.....	.59	.59	
Liberty	.....	.....	.....	.....	.....	35.67	35.67	
Gloster	.....	.....	.....	.....	.....	(19.30)	(19.30)	
Refund paid on pipe for Trunk Line	.....	.....	.....	.....	(1,501.81)	.....	(1,501.81)	
Total	$4,510.99	$10,262.48	$5,529.89	$20,296.36	$1,017.84	$4,012.43	$5,030.27	

NOTE.—All income on oil handled through Trunk Line has been eliminated from these figures in computing sales tax.

17

[fol. 22] TRANSCRIPT OF ORDER, STATE TAX COMMISSION, JACKSON, MISSISSIPPI

Office State Tax Commission Mar. 10, 1947.

STATE OF MISSISSIPPI,
County of Hinds, ss:

Be it Remembered That on the date stated above the State Tax Commission of said state adopted an order which was in words and figures as follows, to-wit:

In the Matter of the Petition of the INTERSTATE OIL PIPE LINE COMPANY for Revision of Sales Tax and Use Tax Heretofore Assessed for the Period January 1, 1944, to June 30, 1946

The above styled cause came on for final determination on this the 10th day of March, 1947, pursuant to a hearing before the Commission by the taxpayer, Interstate Oil Pipe Line Company on January 30, 1947, as shown by an order entered on pages 1 and 2 of this Minute Book, and by said order continued to a future date for further consideration by the Commission of the questions presented for decision.

The Commission has studied the evidence as set forth in the records, being the various tax returns filed by the said Company and other facts of record in the several tax reports of the said company, and has also considered the brief as filed by the attorneys for the said company. After a full and careful study and consideration of all pertinent evidence and the brief of the attorneys, the Commission is of the opinion that the said taxpayer, interstate Oil Pipe Line Company, is liable for, and should pay, the sales tax and use tax heretofore assessed by the Commissioner in the sum of $25,326.63, for the period from January 1, 1944, to June 30, 1946, as stated in detail in the Order of this Commission dated January 30, 1947.

The Commission finds that the admitted facts are that the Interstate Oil Pipe Line Company operates numerous gath- [fol. 23] ering lines in the State of Mississippi which are used to gather oil from individual oil producing wells and to convey it from the wells through the pipe lines of the said company by two general methods. First, oil gathered from individual wells and carried through the pipe lines of said

company directly and without interruption out of the State of Mississippi and into the State of Louisiana, to an oil refinery located at Baton Rouge, Louisiana. Second, oil gathered from individual wells and transported through the pipe lines of said company to several points on railroads, known as loading stations, located in this state, where the oil is transferred from the pipe lines of said company to tank cars on the railroad, and from there shipped by the owner of the oil to points outside the State of Mississippi by rail.

The Commission finds that the business of the company as stated in the first operation is interstate in character, and has been properly excluded from the gross income included in the measure of the tax. The Commission finds that the second operation is intrastate in character, and the transportation of oil by pipe line from individual oil wells to railroad stations in this state for reshipment to points outside of the state by rail, is intrastate business, and the gross income derived therefrom is to be included in the measure of the tax.

The commission finds that the business of the Company in moving the commodity here under consideration from the point of production to the railroad station located in this state for reshipment, is a simple intrastate operation, regardless of whether or not the oil is ultimately to be shipped in interstate commerce. The sole connection of the company with the commodity is to carry it from the place where it is produced to a railroad where it is loaded into tank cars for reshipment.

SECRETARY'S CERTIFICATE

I, A. S. Coody, Secretary of the State Tax Commission [fol. 24] of the State of Mississippi, so hereby certify that the above and foregoing is a true and correct copy of an order adopted by the said Commission on the date therein stated as the same appears of record in Minute Book — at Page —, an official record in said office and in my official care and custody.

Witness my signature this the — Day of ——, 194-.

——— ———, Secretary, State Tax Commission.

[fol. 25] TRANSCRIPT OF ORDER, STATE TAX COMMISSION, JACKSON, MISSISSIPPI

Office State Tax Commission, —— —, 194-

STATE OF MISSISSIPPI,
County of Hinds, ss:

Be It Remembered That on the date stated above the State Tax Commission of said state adopted an order which was in words and figures as follows, to-wit:

2

The Commission finds that the merchandise purchased from out of state vendors by the company and used on their pipe lines, in which pipe lines the company moves oil from the individual oil producing well to points on railroads within the state, is subject to the provisions of the Mississippi Use Tax Law, since such pipe lines are deemed to be used in intrastate commerce. The Commission finds that such merchandise is not used or consumed in the furtherance of interstate transportation or interstate commerce.

It is, therefore, ordered and adjudged that the petition of Interstate Oil Pipe Line Company for revision of sales tax and use tax heretofore assessed by the Commissioner for the period January 1, 1944, to June 30, 1946, both dates inclusive, as set out in detail below, be and the same is hereby denied and overruled, and the judgment of the Commissioner be and is hereby sustained, and the petitioner, Interstate Oil Pipe Line Company, be and is hereby adjudged to be liable for sales tax and use tax as assessed for said period in the total sum of $25,362.63; and the decision of the Commissioner with respect thereto is hereby sustained, approved, and confirmed;

Sales Tax Calendar Year 1944	$4,510.99	
Sales Tax Calendar Year 1945	10,262.48	
Sales Tax January 1 to June 30, 1946	5,522.89	
		$20,296.36
Use tax Calendar Year 1944	1,017.84	
Use Tax Calendar Year 1945	3,532.12	
Use Tax January 1 to June 30, 1946	480.31	
		5,030.27
Total sales and Use Tax		$25,326.63

Ordered and adjudged this the 10th day of March, 1947.

[fol. 26] SECRETARY'S CERTIFICATE

I, A. S. Coody, Secretary of the State Tax Commission of the State of Mississippi, do hereby certify that the above and foregoing is a true and correct copy of an order adopted by the said Commission on the date therein stated as the same appears of record in Minute Book 5 at page 4 an official record in said office and in my official care and custody.

Witness my signature this the 11 day of March, 1947.

A. S. Coody, Secretary, State Tax Commission.

[fol. 27] EXHIBIT 3 TO DECLARATION

No. 34964

Series "E" Check $25,326.63

Field Auditor's Receipt

Mississippi State Tax Commission,
Jackson, Mississippi

Cash $——

Received of Interstate Oil Pipe Line Co., Tulsa, Okla.,

Street and No. City County

Twenty Five Thousand Three Hundred Twenty Six & 63/100 Dollars on account of Sales Tax, Jan. 1-1944 June 30, 1946—
(Kind of Tax)

Use Tax—1944-1946. Receipt is hereby acknowledged, payment by other than legal spoole Being Subject to Collection, of the Receipt From the Person Above of the stated amount for the account shown. This receipt is issued as evidence only of the payment of the amount stated.

A. H. Stone, Commissioner, By J. L. Buster, Agent for the Commissioner.

Date 3-24, 1947.

[fol. 28] EXHIBIT 2 TO DECLARATION

March 24, 1947.

Honorable A. H. Stone, Chairman of State Tax Commission and Commissioner of Sales and Compensating Taxes, Jackson, Mississippi.

DEAR MR. STONE:

In behalf of Interstate Oil Pipe Line Company we hand you herewith its check No. 2062 on The National City Bank of New York, Fifty-First Street Branch, payable to State Tax Commission, State of Mississippi, Jackson, Mississippi, in the sum of $25,326.63.

This sum is paid to you under protest and is to cover an assessment made by you against Interstate Oil Pipe Line Company for sales taxes for the calendar years 1944 and 1945 and for period from January 1 to June 30, 1946, aggregating $20,296.36, and for the compensating or use taxes for the same period of time, aggregating $5,030.27.

This assessment was made by you, or at your instance on December 10, 1946, and after a hearing before the State Tax Commission on the petition of the said Interstate Oil Pipe Line Company, the assessment was sustained by order of the State Tax Commission rendered on March 10, 1946, and as shown in the minutes of said Commission in Minute Book 5 at page 4.

Interstate Oil Pipe Line Company respectfully notifies you that suit will be instituted against you in the proper court to recover the amount paid as above set out, in full accord with the statutes made and provided for in such cases, on the ground that Interstate Oil Pipe Line Company is not liable for these taxes, or any part thereof.

Please acknowledge receipt of this payment.

Yours respectfully, Interstate Oil Pipe Line Company. By Jas. A. Alexander, Walter D. Davis.

[fol. 29] JAA:cm.

Enclosure.

cc: Walter D. Davis, P. O. Box 1115, Jackson, Miss.; P. H. Hunter, P. O. Box 1349, Tulsa, Okla.

(File endorsement omitted.)

[fol. 30] IN THE CIRCUIT COURT OF THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY, MISSISSIPPI

[Title omitted]

PLEA TO DECLARATION—Filed May 16, 1947

Comes A. H. Stone, Chairman of the State Tax Commission, the defendant in the above-styled and numbered cause, by his attorney, and for plea to the declaration filed against him in said cause would respectfully show to the Court the following, to-wit:

I

It is admitted that the plaintiff is a corporation organized and existing under and by authority of the laws of the State of Delaware, and is duly qualified as a foreign corporation to do business in the State of Mississippi, and maintains in the City of Jackson, Hinds County, Mississippi its principal Mississippi Office in charge of its duly designated agent for service of process.

It is also admitted that the defendant, A. H. Stone is the duly and legally appointed, qualified and acting Chairman of the State Tax Commission of Mississippi, and is officially and legally designated the Commissioner charged with the duty of administering the so-called Sales Tax Law of Mississippi, and the Compensating or Use Tax Law of Mississippi, and charged with the duty of collecting the taxes imposed by said laws. And that the defendant's office is in the New Capitol Building in the City of Jackson, Mississippi.

II

The plaintiff, the Interstate Oil Pipe Line Company, is a common carrier, and at the time of the accrual of the taxes [fol. 31] which were demanded and paid, and for which this suit is filed for recovery thereof, was engaged in the business of a common carrier engaged only in the business of gathering and transporting crude oil for various shippers for hire, from the places of production in the state to places within the state where delivery was made to common carriers for transportation outside of Mississippi. And it is possible, and therefore neigher admitted nor denied that it operated under the jurisdiction of the Interstate Commerce Commission, and that the rates charged for th- service ren-

dered in the state were covered by tariffs which were regularly published and filed with the Interstate Commerce Commission. But defendant contends that even though it received oil only for transportation when said oil was consigned for shipment to points outside of the State of Mississippi, is not material for the purpose of this suit.

III

It may be true that all oil which the plaintiff gathered and transported within the state of Mississippi was tendered to it for shipment by the owner or purchasers of the crude oil at the lease tanks which were located at or near oil wells in the various oil producing fields within the State.

And it may be true that all oil which plaintiff gathered and transported within the State of Mississippi was ultimately consigned for transportation or shipment to destinations outside of the state either by trunk pipe line, or by railroad tank cars. But the defendant states that this fact is not material for the purpose of the legal question involved in this suit.

The defendant admits that crude oil is a lawful article of commerce, and in the transportation of said oil the plaintiff operated oil pipe lines called gathering lines, some of which lines ran from the lease tanks situated at or near producing wells in the various fields to railroad tracks where the oil is transferred into tank cars for shipment, and while it is true [fol. 32] that plaintiff ultimately constructed pipe lines designated as "trunk pipe lines," which carry the oil across the state lines and out of the State of Mississippi into the State of Louisiana, none of the tax demanded by the defendant and paid by the plaintiff was based upon any activity of the plaintiff where there was a continuous movement of the oil from the places of production through trunk pipe lines to points outside of the state. But the defendant denies that the oil transported from lease tanks to the various railroads for shipment by tank car was tran-ported in continuous transit in Interstate Commerce.

IV

Defendant admits that the gathering systems in each of the fields and maintained by the plaintiff consisted of lines of pipe extending from a central or main line to lease tanks which were located in the immediate vicinity of oil wells on

various producing leases. And the defendant admits that as the oil fields developed, the gathering system were expanded and lines were extended to lease tanks serving new wells. But it is denied that the gathering system which lead into trunk pipe lines which traverse state lines, were included in the operation of the plaintiff for which the tax was demanded and paid. But the tax demanded and paid was computed only upon the operation of the plaintiff in transporting the oil from the places of production to loading racks at points on the railroad where the oil was delivered to the common carrier for transportation out of the state. And it may be true that the oil transported through gathering lines to the railroad loading racks, thence into tank cars, only began when said oil was intended to be shipped or transported out of the state. But it is denied that all such cases of such transportation was a continuous movement of said oil from said lease tanks to ultimate out of the state destination.

[fol. 33]

V

It is true as alleged in the declaration that the defendant, by and through C. R. Gartin, Chief of the Sales and Use Tax Division, gave notice on December 10, 1946 of a proposed assessment against the plaintiff, alleging that the said plaintiff owed Sales Tax for the years 1944 and 1945 and from the Period January 1 to June 30, 1946, aggregating $20,296.36, and the proposed assessment was made against the plaintiff for Use or Compensation taxes for the same period of time and which were included in said notice, aggregating $5,030.27, making a total of Sales and Use Taxes demanded of $25,326.63.

VI

It is true that the defendant, through his duly constituted agent, made said proposed assessments under the authority of the law of the provisions of which said taxes were imposed. It is likewise true that under the provisions of said laws the defendant, as Commissioner, has the exclusive authority for the administration of said laws and the enforcement of the provisions thereof, and is charged with the duty of making the assessment and collecting the taxes imposed by said law.

VII

It is true that the plaintiff, on December 18, 1946, in response to said demands filed his pe-ition with the State Tax Commission for the purpose of correcting or *or* setting aside the said assessment, and prayed that the Commission determine that the objection to said assessments, as made by the Commissioner, should be sustained as incorrect, and it is likewise true that the hearing was granted on said pe-ition and was held on the 30th day of January 1947, in the office of the State Tax Commission, said date having been agreed upon by the parties, and that on March 10, 1946, the State Tax Commission entered its order as authorized by law, sustaining said assessments both for the Sales Tax demanded and the Use Tax demanded. And [fol. 34] it is likewise true that in the order of said Commission, it announced its conclusion that the taxes demanded both for Sales Tax upon the amount received for transporting the crude oil, being from lease tanks to railroads and loading ramps, constituted Intra-State Commerce exclusively; therefore, the taxes demanded were proper under the provisions of the law. And it is true that the Commission, by its order, adjudicated the facts that where the original movement of the oil through the gathering lines and was continuous through the trunk pipe lines owned by the plaintiff, and that their activity consisted of movement of oil from the point of origin within the state to the ultimate destination without the state, and the compensation received was for such continuous movement, then such activity was Interstate Commerce, and no taxes were demanded from the plaintiff on account of such activities. The Exhibits A, B, C and D, filed with the petition before the State Tax Commission, constituting a part of Exhibit I, correctly show a deduction of $222.57.

IX

The defendant denies, however, the allegation of paragraph 9 of the declaration. It being the contention of the defendant, as adjudged by the Tax Commission, that the activities of the plaintiff are wholly and exclusively in Intra-State Commerce. And the defendant likewise contends that both the Sales Tax and Use Tax collected from the plaintiff, which were paid under protest, were properly collected because the activity of the plaintiff within the

State on account of which said taxes were collected was wholly Intra-state Commerce, which fact made said taxes properly due and payable. And the contention of the plaintiff that such activity constituted Interstate Commerce is denied, since insofar as a connection with the plaintiff with such transportation, it was not continuous in Interstate Commerce, but wholly within the State of Mississippi, and therefore Intra-state Commerce.

X

It is not denied that the plaintiff has borne the burden of [fol. 35] the tax paid and that it had not directly or indirectly collected such taxes, or any part thereof, from its customers. But it is denied that the plaintiff was entitled to recover the taxes paid.

XI

The defendant admits that the quotation of Section 10,109 of the Acts of 1942, quoted in the eleventh paragraph of the declaration would exempt the plaintiff from the tax demanded, if the plaintiff's activity had been in Interstate Commerce, but it is denied that the plaintiff's activity was wholly or even partially in Interstate Commerce in the sense contemplated by said provisions of the law.

XII

It is admitted that the portion of Section 10,149 of the Acts of 1942 quoted in the declaration would exempt the plaintiff from the Use Tax demanded and paid if the activities of the plaintiff had been in Interstate Commerce, but it is denied that such activity was other than Intra-state Commerce, and therefore, said exemption provision does not apply to the activities of the plaintiff.

XIII

It is denied that the allegations of Section 13 are true that the taxes collected are incorrect as coming within the exemption provisions of the statute quoted, and it is the contention of the defendant that the plaintiff's activities and operations within the state for the period and under the circumstances set out in its declaration were wholly in Intra-state Commerce and not in Interstate Commerce as

alleged. And it is denied that the imposition of said tax under the facts in this case constitute violation of the Commerce clause of the Constitution of the United States, Article I, Section 8, Clause 3. And it is denied that said assessment against the plaintiff was invalid or improper as contravening Article 14 of the 14th Amendment of the Constitution of the United States, neither does it contravene [fol. 36] Section 14 of the Constitution of the State of Mississippi nor of Section 112 of the Constitution of Mississippi.

XIV

The defendant likewise denies generally, without setting up separately in detail the allegations of paragraph 14 of the plaintiff's declaration that the construction and application of the laws involved would make said laws void and of no effect.

XV

Defendant takes issue with the charge of plaintiff that neither the Sales Tax nor Use Tax demanded and paid were improperly collected, but admits that the plaintiff was authorized to bring this suit for the purpose of having this Court decide whether or not the action of the Commissioner in demanding the tax, and requiring payment thereof as confirmed and ratified by the whole Commission, was proper and correct interpretation and enforcement of the laws involved. And the defendant denies that because all the oil gathered by the plaintiff and transmitted from one point in the state to another point in the state, without further responsibility for said oil, constituted an activity in Interstate Commerce even though all of said oil was ultimately to be transported outside of the state.

XVI

The defendant admits that the plaintiff was authorized by law to file this suit, but of course denies the right of recovery of the amount sued for.

And of all of which the defendant puts himself upon the Country.

A. H. Stone, Defendant, by J. H. Sumrall, Attorney.

[File endorsement omitted.]

[fol. 37] IN THE CIRCUIT COURT OF THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY, MISSISSIPPI

[Title omitted]

AGREED STATEMENT OF FACTS—May 16, 1947

The statement hereafter set out is agreed to by A. H. Stone, Commissioner of Sales Taxes and Compensating Taxes, for the State of Mississippi, hereinafter referred to as the Commissioner, represented by J. H. Sunrall, attorney for the State Tax Commission, and duly authorized, and by Interstate Oil Pipe Line Company, hereinafter referred to as the Company, represented by P. H. Hunter, J. L. Seger, Walter D. Davis, and James A. Alexander, counsel for the Company and duly authorized.

I

Said agreed statement is to be used in the trial of this cause before the Circuit Court of the First District of Hinds County, Mississippi, which is a suit by the Company against the Commissioner for the recovery of sales taxes aggregating $20,296.36 claimed by the Commissioner to be due for the assessment years 1944, 1945 and for the period from January 1 to June 30, 1946, and also for compensating, or use, taxes for the same period of time aggregating $5,030.27, said total sales and use taxes having been paid by the Company under protest on March 24, 1947, and with notice to said Commissioner of intention of instituting this suit for the recovery thereof.

II

This case may be tried on a date convenient to the Court and the parties hereto, to be hereafter fixed and agreed upon, in the Circuit Court of the First District of Hinds County, Mississippi, without a jury.

[fol. 38] III

The transcript of the proceedings before the Commissioner and the State Tax Commission as set out in Exhibit 1 to the Declaration herein is to be taken as part of this agreement as if incorporated herein. By agreement the condensed statement showing the total sales and use taxes involved in

this action is attached as the exhibit to the petition, in lieu of the statements which originally comprised Exhibits A, B, C and D to said pe-ition. The copy of transmitted letter in behalf of the Company to the Commissioner accompanying the payment of $25,326.63 of the said sales taxes, referred to in the Declaration as Exhibit 2, is herewith to be admitted as part of this agreement.

The receipt from A. H. Stone, Commissioner, by J. L. Brister, for the Commission, No. 34964 for the said sum of $25,326.63 in payment of said taxes under protest, which is referred to in the Declaration as Exhibit 3, is also admitted as part of this agreement. The entire record as made by the documents and papers in this cause, including the Declaration of the Company with Exhibits, together with the pleadings filed in behalf of the Commissioner, this Agreed Statement of Facts, and any other evidence that may be introduced at the trial hereof, is to be submitted to the Court on a hearing of this cause and considered on the trial of the issues made up therefrom.

IV

The Company is a corporation organized under the laws of Delaware.

The Company filed a copy of its Charter with the Secretary of the State of Mississippi and paid the required filing fees and was duly qualified to do business as a foreign corporation in the State of Mississippi on January 15, 1942. At this same time the Company designated and appointed a resident agent for service of process in the State of Mississippi as required by law. Such agent is J. H. Thompson, [fol. 39] who resides in and maintains an office in Jackson, Mississippi in said county and district.

V

A. H. Stone is the duly and legally elected, qualified and acting Chairman of the State Tax Commission of Mississippi, and is the official and legally designated Commissioner for the collection of sales taxes and compensating or use taxes in the State of Mississippi. His office is in the State Capitol in the City of Jackson, Mississippi, and he holds his said office and official position under and by virtue of the laws of the State of Mississippi.

The Company has paid for each of the years involved in

this action substantial amounts of franchise and income taxes to the State of Hississippi and has also paid ad-valorem taxes on its properties to said State and its local subdivisions.

VII

The Company is a common carrier engaged only in the business of gathering and transporting crude oil for various shippers for hire, and is an interstate carrier operating under the jurisdiction of the Interstate Commerce Commission, and all of its transportation of oil in Mississippi is covered by tariffs which are regularly published and filed with the said Interstate Commerce Commission.

VIII

During the period of January 1, 1944, to June 30, 1946 the Company had installed and operated gathering systems for the transportation of oil from the lease tanks situated at or near the oil wells in various fields in Mississippi to loading racks located adjacent to railroads as follows:

Cranfield Field, located in Adams County, Mississippi, with connecting lines to a railroad loading rack on the Mississippi Central Railroad at Noble, Mississippi

Eucutta and Heidelberg Fields, located in Wayne and Jasper Counties, Mississippi, with connecting lines to the railroad loading racks at Hiwanee, Mississippi on the Gulf, [fol. 40] Mobile & Ohio Railroad, and at Heidelberg, on the New Orleans and Northeast Railroad.

Gwinville Field, in Jefferson Davis County, Mississippi, with connecting lines to a railrooad loading rack at New Hebron, Lawrence County, Mississippi.

Mallalieu Field, located in Lincoln County, Mississippi, with connecting lines to a railroad loading rack at Brookhaven, Mississippi.

Pickens Field, located in Yazoo County and Madison County, Mississippi, with connecting lines to a railroad loading rack on the Illinois Central Railroad near Pickens, Mississippi.

Some of these gathering lines which were first connected with railroad loading racks as above set out were later connected with trunk pipe lines which were constructed in said

area, and the use of the railroad loading rack was discontinued in these cases. At the present time all oil gathered by the Company in Mississippi is moved out of the State by trunk pipe lines except that gathered in the Pickens and Heidelberg-Eucutta Fields, which is still being shipped out of the State of railroad. The sales taxes for which recovery is sought herein were paid on gross income for gathering and transporting to, and loading of oil on tank cars at, railroad loading racks in the various oil fields as shown by the Exhibit attached to the petition which was filed before the State Tax Commission and which is part of plaintiff's Exhibit No. 1 to the Declaration in the case.

Of the total use, or compensating, taxes in the amount of $5,030.27 for which recovery is sought herein, taxes of $4,362.75 were paid for the privilege of using tangible personal property in the construction and operation of pipe line gathering systems and loading racks which were used for gathering and transporting oil from lease tanks situated at or near the oil wells in the various fields set out herein (and on the Exhibit attached to and made a part of plaintiff's Exhibit No. 1 to the Declaration in this case) to loading [fol. 41] racks adjacent to railroads at the points indicated and for loading said oil aboard tank cars at said points for shipment by railroad to destinations outside the State of Mississippi. Use tax in the amount of $677.52 included in the amount of $5,030.27 assessed and paid under protest, recovery of which is sought herein, was paid for the privilege of using certain copper wire, glass insulators, fittings, hardware, brackets, lamps, screws and other supplies in constructing a telephone system in Mississippi. Said telephone system was constructed on or adjacent to the Company's interstate trunk pipe line right of way and was necessary to and used solely in connection with the dispatching and movement of interstate oil shipments and the servicing and maintenance of said interstate trunk line system.

All of the oil gathered, transported and loaded aboard tank cars with respect to which sales and use taxes were paid, recovery of which is sought herein, was consigned for shipment to destinations outside the State and was in fact transported by the railroads from points of loading to destinations outside the State of Mississippi in continuous interstate commerce.

IX

The Company does not purchase any crude oil in the State of Mississippi other than small quantities for fuel purposes incident to the operation of pumping machinery. It operates exclusively as a common carrier and transports oil for various shippers for hire. All oil which it gathers in the State of Mississippi is consigned for shipment to destinations outside the State, either by trunk pipe line or by railroad tank car. The gathering and transportation, where trunk line facilities are used, and the gathering and loading aboard tank cars, are covered by interstate tariffs which are regularly published and filed with the Interstate Commerce Commission. Attached hereto is company's tariff, published and filed with the Interstate Commerce Commission, pertaining to oil moved from the Pickens Field. Said tariff is representative of tariffs published and filed with [fol. 42] reference to the oil movements mentioned herein. All oil gathered and loaded aboard tank cars is tendered for shipment by the owner or purchaser at the lease tanks in the producing fields prior to the movement of the oil. The shipper furnishes the company a "ten-er of shipment" form for each shipment which specifies the quantity of oil to be moved, the origin and ultimate out-of-state destination, and the tariff under which the shipment is made. It also contains shipping instructions as to consignee, destination, route of shipment, etc. Representatives of this company, together with representatives of the producer or shipper, *guage* the oil in the lease tanks, run out the quantity designated, then again *guage* the lease tanks and jointly sign the "Run Ticket" showing opening and closing *guages* from which the quantity shipped is computed. The oil is then pumped into the main gathering line and thence to the loading rack, or working tanks adjoining the loading rack. When tank cars for the shipment have been spotted at the loading rack, they are loaded and Company representatives obtain from the railroad the bill of lading and other shipping papers covering the shipment, showing the consignor of the oil as shipper, with Company shown as agent of the shipper, and indicating thereon the destination previously specified by the shipper. For its services in gathering and loading the crude oil, Company is paid by the shipper at the rate per barrel stipulated in its applicable Interstate Commerce Commission tariff.

X

A pipe line gathering system consists of lines of pipe extending from a central or main line to connect with lease tanks located on the producing leases in the vicinity of the wells, and pumps to move oil from the lease tanks through the pipe lines to a main trunk pipe line or to a loading rack adjacent to a railroad.

The loading rack consists of a main pipe, or header, lying in or on top of the ground parallel to a railroad spur, with [fol. 43] smaller perpendicular lines welded thereto extending upward to the loading rack walkway. On top of these perpendicular lines are movable connecting joints, so places as to fit the intake valves of tank cars on the adjacent spur track. In loading tank cars the oil is pumped through the loading racks and into the intake valves of the cars by pumps operated by Company. In some instances small working tanks are constructed in connection with the loading racks to provide for accumulation of oil until tank cars for shipment have been spotted by the railroad. Oil is places in these tanks only to facilitate tank car loading operations, and remains ther in only until tank cars have been spotted in position for loading, usually a matter of only a few days and never more than a week. In some cases where production from a field is small, and other cases in order to conserve tank space and to eliminate double pumping, the oil may be pumped directly from the lease tanks into tank cars.

XI

The amount of sales taxes demanded by the Commissioner and paid by the Company, and which it is sought to recover by this suit, was computed only upon the amount of compensation received by the Company for transporting oil or petroleum products from the places of production in the State to the places in the State where deliveries were made to a railroad or other common carrier for transportation out of the State. And did not include any compensation received by the Company for transportation beyond the Boundaries of the State.

XII

The amount of compensation or use tax demanded by the Commissioner and paid by the Company, and which it is.

sought to recover by this suit, included only tax computed upon the purchase price of material brought from without the state, and brought into the state for use exclusively in their equipment used in transporting crude oil from the places of production in this state to the places in this state where it was delivered to a railroad or other common car-
[fol. 44] rier for transportation out of the state. And did not include any material used in the construction of facilities employed by the Company in transporting crude oil beyond the borders of the state exclusively through Company lines.

XIII

After the Company constructed its "trunk pipe lines" into the state, and transmitted continuously through its gathering system and trunk line crude oil from the places of production in the state to points beyond the state, no claim was made for taxes on any part of the compensation received for such transportation, such activity admittedly being Interstate Commerce, which fact exempted the Company from the sales tax upon the compensation received for such activity, as well as from the use tax upon the equipment purchased thereafter from without the state and brought into the state for use in the construction of the facilities with which the interstate movement was conducted.

XIV

The Commissioner claims authority to act under the provisions of Title 40, Chapter 3, Provisions 1 and 3 of 1942 Code of Mississippi, officially designated as the Emergency Revenue Act of 1934, and also known as the General Sales Tax Law, and the Use of Compensating Tax Law. The assessment made against Company for sales taxes and use taxes involved in this litigation is alleged to be accrued under and by virtue of this said law and covers the period of time from January 1, 1944 to June 30, 1946.

XV

Company has borne the burden of the taxes herein involved alone and has not directly or indirectly collected said taxes or any part thereof from its customers, and, therefore, is the real and only party having an interest in this suit.

XVI

This agreed statement of facts is intended to cover all of [fol. 45] the facts necessary for a proper determination of the issues involved in this suit, but said parties hereto reserve the right to amplify the statement by evidence of any additional facts that may be relevant to the cause, and that do not conflict with this agreed statement of facts.

Witness the signatures of the counsel for the parties, plaintiff and defendant, on this the 16th day of May, 1947.

J. H. Sumrall, Counsel for A. H. Stone, Chairman of State Tax Commission. P. H. Hunter, J. Seger, Jas. A. Alexander, Walter D. Davis, Counsel for Interstate Oil Pipe Line Company.

[fol. 45a] Exhibit to Agreed Statement of Facts

No supplement to this tariff will be issued except for the purpose of canceling the tariff unless otherwise specifically authorized by the Commission.

I. C. C. No. 41. Cancels I. C. C. No. 368. (Oklahoma Pipe Line Company Series.)

Interstate Oil Pipe Line Company

* Local Tariff

Applying on Crude Petroleum

The rates named in this tariff are subject to the Rules and Regulations published on page 2 hereof.

From: * Lease tankage within the territory of the Interstate Oil Pipe Line Company's gathering system in the Pickens Field, Yazoo and Madison Counties, Mississippi.

To: * Delivery point of the Interstate Oil Pipe Line Company on the Illinois Central Railroad near Pickens, Holmes County, Mississippi.

Gathering Rate in Cents Per Bbl. of 42 U. S. Gallons: 4.

Loading Charge: All crude petroleum required to be loaded into railroad tank cars or tank trucks at above destination will be subject to an additional charge of two cents (2c) per barrel.

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* Denotes changes in wording which result in neither increases nor reductions in charges.

Shipments gathered and transported under this tariff are entitled to such privileges and subject to such charges as are or shall be published by this Company and such as are lawfully in effect on date of shipment and lawfully on file with the Interstate Commerce Commission as to interstate traffic, providing for reconsignment, storage, transit privileges, or any other privileges, charges or rules which in any way increase or decrease the amounts to be paid on any shipment transported under this tariff, or which increase or decrease the value of the service to the shipper.

Issued January 2, 1945. Effective February 1, 1945.

Issued by Bruce Ramsey, Vice President, Interstate Oil Pipe Line Company, 921 National Bank of Tulsa Building, Tulsa, Oklahoma.

[fol. 45b] Regulations

This Company will receive crude petroleum, as herein defined, from lease tankage within the area of its gathering system, for transportation to destination named herein, for interstate transportation beyond, under the terms and conditions of the following rules and regulations.

1. Definition of Crude Petroleum:—The term "crude petroleum," as used in this tariff, means the direct product of oil wells or a mixture of the direct product of oil wells and the indirect petroleum products resulting either from refining crude petroleum or from the operation of gasoline recovery plants, gas recycling plants or distillate recovery equipment in gas and distillate fields.

2. Definition of Barrel:—By a barrel of crude petroleum, as used in this tariff, is meant forty-two (42) U. S. gallons at a temperature of sixty (60°) degree Fahrenheit.

3. Conditions Under Which Indirect Petroleum Products Will Be Received:—Indirect petroleum products will be received for gathering and transporting only on condition that they have been mixed with direct products of oil wells or on condition that they can be mixed with direct products of oil wells in the tanks or lines of this Company at the point offered, and provided that both the indirect products and the direct oil well products with which they are so mixed

are owned by the same shipper and are consigned to the same destination.

4. Right to Reject Shipments:—This Company reserves the right to reject any and all shipments of crude petroleum that have a Reid Vapor Pressure in excess of ten pounds (10#) at one hundred degrees (100°) Fahrenheit; also any and all shipments that contain basic sediment, water or other impurities, at a point four inches (4") below the pipe line connection, totalling in excess of one-half of one per cent (½ of 1%) as determined by the centrifugal test, or by such other tests as may be agreed upon by the shipper and this Company. This Company also reserves the right to reject any and all shipments where the shipper or consignee have failed to comply with all applicable laws, rules and regulations made by any Governmental authorities regulating shipment of crude petroleum or petroleum products.

5. Minimum Tenders and Acceptances:—Orders for the shipment of crude petroleum shall be submitted in writing on this Company's prescribed tender of shipment form. This company will receive for gathering and transporting all such crude petroleum tendered by the shipper individually or by him and others, provided it is of the same kind and quality, is consigned to the same point of delivery, is in the minimum quantity of ten thousand (10,000) barrels, and is of such grade as not to damage or change the characteristics of the common stock crude petroleum in the lines of this Company as said crude petroleum would pass through to destination; provided, however, that the shipper and this Company may agree for the gathering and transporting of crude petroleum, the characteristics of which differ from the common stock of crude petroleum in said lines.

6. Apportionment When Tenders Are in Excess of Facilities:—When pursuant to tenders hereunder there shall be offered to this Company more crude petroleum than can be immediately gathered and transported, the gathering and transporting shall be apportioned among all shippers in proportion to the rate at which deliveries are currently offered to this Company under tenders then in effect.

7. Liability of Pipe Lines:—This Company, while in possession of crude petroleum tendered under this tariff shall not be liable for any loss thereof, the damage thereto or

delay caused by fire, storm, flood, epidemics, act of God, riots, strikes, insurrection, rebellion, war, act of public enemy, quarantine the authority of law, requisition or necessity of the Government of the United States in time of war, default of shipper or owner, or from any other cause not due to the negligence of this company. In case of loss of any crude petroleum from any such causes, after it has been received for gathering and transporting and before the same has been delivered to consignee, shipper shall stand a loss in such proportion as the amount of his shipment, already delivered to this Company, bears to all of the crude petroleum then in the custody of this Company for shipment via the lines or other facilities in which the loss or damage occurs, and the shipper shall be entitled to have delivered only such portion of his shipment as may remain after deduction of his due proportion of such loss, but in such event shipper shall be required to pay charges only upon the quantity of crude petroleum delivered.

8. Destination Facilities:—Crude petroleum will be received for gathering and transporting only when the shipper or consignee has provided the necessary facilities for receiving said crude petroleum as it arrives at destination.

9. Identity of Oil:—Crude petroleum will be accepted for gathering and transporting only on condition that it shall be subject to such changes in gravity or quality while in transit as may result from the gathering and transporting thereof or mixture of said crude petroleum with other crude petroleum in the pipe lines or tanks of this Company. Unless so required by Agreement entered into between the shipper and this Company, as provided for in Regulation 5 hereof, this Company shall be under no obligation to make delivery of the identical crude petroleum received but reserves the right to make delivery out of its common stock of substantially like kind and value.

10. Crude Petroleum Involved in Litigation:—Crude petroleum, which is in any way involved in litigation, or which is encumbered by a lien or charge of any kind, will not be accepted for gathering and transporting unless and until the shipper or consignee shall furnish a bond or other form of indemnity satisfactory to this Company, protecting it against any liability or loss arising as a result of such litigation, lien or charge.

11. Payment of Tariff Charges:—The shipper or consignee shall pay all lawful tariff charges accruing on crude petroleum delivered to and accepted by this Company for shipment, and, if required, shall pay the same before delivery at destination. Crude petroleum accepted for gathering and transporting shall be subject to a lien for all such charges and said lien shall attach to any crude petroleum not yet delivered to destination for all unpaid charges arising hereunder on crude petroleum covered by the same tender.

12. Claims, Suits and Time for Filing:—As a condition precedent to recovery, claims must be filed in writing with this Company, within nine (9) months after delivery of the property; or, in case of failure to make delivery, then within nine (9) months after a reasonable time for delivery has elapsed; and suits shall be instituted against this Company only within two (2) years and one (1) day from the day when notice in writing is given by this Company to the claimant that this Company has disallowed the claim or any part or parts thereof specified in the notice. Where claims are not filed or suits are not instituted thereon in accordance with the foregoing provisions, this Company shall not be liable and such claims will not be paid.

13. Gaging, Testing and Deductions:—Crude petroleum tendered to this Company for gathering and transporting shall be gaged and tested by a representative of this Company prior to its receipt from the shipper, but the shipper shall have the privilege of being present or represented at the gaging and testing. Quantities shall be computed from correctly compiled Tank Tables on a one-hundred per cent (100%) volume basis. Crude petroleum of required specification will be received and delivered corrected as to temperature from observed degrees Fahrenheit to sixty degrees (60°) Fahrenheit, on the basis of National Bureau of Standards Abridged Volume Correction Table for Petroleum Oils, Supplement to National Bureau of Standards Circular C-410, issued April 20, 1937, (A. S. T. M. Designation: D-206-36; A. P. I. Standard No. 500). A centrifuge machine or other methods agreed upon shall be used for ascertaining the percentage of basic sediment, water or other impurities in the crude petroleum and the full amount of basic sediment, water, and other impurities shall be deducted from the cor-

rected volume. The net balance at sixty degrees (60°) Fahrenheit will be the quantity deliverable by this Company and tariff charges will be assessed in accordance therewith.

14. Evidence of Receipts and Deliveries:—Crude Petroleum received and delivered on tenders shall be evidenced by run tickets, Receipt/Delivery tickets, Bills of Lading or Loading Reports showing gages, temperatures, basic sediment and water, gravity and any other data essential to the determination of quantity and quality. Representatives of the shipper and consignee are privileged to witness the sampling, gaging and testing of the crude petroleum if they so elect.

[fol. 46] IN THE CIRCUIT COURT OF THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY, MISSISSIPPI

[Title omitted]

PETITION FOR APPEAL—Filed July 31, 1947

Comes Interstate Oil Pipe Line Company, plaintiff, by its attorneys of record, and herein petitions for an appeal to the Supreme Court of Mississippi from the judgment entered herein dismissing plaintiff's suit, and files herewith an appeal bond without supersedeas, as provided by law.

For Petitioner, Interstate Oil Pipe Line Company, by Jas. A. Alexander, Attorney.

[File endorsement omitted.]

[fol. 47] IN THE CIRCUIT COURT OF THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY, MISSISSIPPI

No. 11941

INTERSTATE OIL PIPE LINE COMPANY

vs.

A. H. STONE, Chairman State Tax Commission

ORDER DISMISSING DECLARATION—July 28, 1947

This cause having been set for hearing in vacation, by agreement of the parties, and an order entered in term time fixing the date for vacation hearing as July 21, 1947; and said cause having been continued from said date by

agreement of counsel for the respective parties until July 22, 1947, and came on for hearing on said day; and the Court having heard and considered the pleadings filed on behalf of the Plaintiff and defendant and the agreed statement of facts signed by the respective attorneys for the plaintiff and the defendant, and a stipulation whereby a jury was waived; and after having heard and considered the arguments and briefs of counsel for the respective p-rties, the Court took the Cause under advisement for further consideration and judgment in vacation.

The Court now being fully advised in the premises, and being of the opinion that the plaintiff is not entitled to recover the amount sued for, nor, nor any amount, doth order and adjudge as follows, to-wit:

That the plaintiff take nothing by its suit.

And that the declaration of the plaintiff be and the same is hereby dismissed at the cost of the plaintiff. For all of which let execution issue.

Ordered and adjudged this the 28th day of July, A. D., 1947.

H. B. Gillespie, Circuit Judge.

M. B. 27—page 392

[fol. 48] [File endorsement omitted]

IN THE SUPREME COURT OF MISSISSIPPI

[Title omitted]

ASSIGNMENT OF ERRORS—Filed September 20, 1947

Comes the appellant, Interstate Oil Pipe Line Company, and assigns as error on the part of the Circuit Court of the First Judicial District of Hinds County, State of Mississippi, for which appellant seeks a reversal of the judgment rendered against it in said court and a final judgment in its favor in this Court, the following:

The Court erred in not holding:

(1) That the gross income of appellant, Interstate Oil Pipe Line Company upon which sales taxes were paid and for refund of which this suit was brought, was excepted from the gross income used in determining the measure of

the tax imposed by Section 10109 of the Mississippi Code of 1942, by reason of the fact that said gross income "was derived from business conducted in commerce between this State and other States of the United States which the State of Mississippi is prohibited from taxing under the Constitution of the United States of America."

and

(2) That the use, storage or consumption of the tangible personal property by appellant, within this State upon which use or compensating taxes have been paid and for refund of which this suit was brought, was exempt from [fol. 49] tax by the provisions of Section 10149 of the Mississippi Code of 1942 by reason of the fact that said personal property was "used or consumed in the furtherance of interstate transportation or interstate commerce;"

and

(3) That if the General Sales Tax Law and the Compensating or Use Tax Law, which are incorporated in Title 40, Chapter 3, Volume 7, of the 1942 Code of Mississippi, as amended by Chapter 262 of the General Laws of Mississippi for 1946, House Bill No. 311, are applicable to Appellant's activities as set out in this suit, then said laws are void and of no effect by reason of the fact that they are in conflict with Article I, Section 8, Clause 3, of the Constitution of the United States, known as the Commerce Clause.

Respectfully submitted: J. L. Seger, P. H. Hunter, F. R. Clark, Jr., James A. Alexander, Walter D. Davis.

A copy of the above and foregoing Assignment of Error has this day been mailed, postpaid, to J. H. Sumrall, attorney for A. H. Stone, Chairman State Tax Commission, appellee, this 19 day of September, 1947.

(S.) James A. Alexander, Of Counsel for Appellant.

[fol. 50] IN THE SUPREME COURT OF MISSISSIPPI

In Banc:

No. 36,672

INTERSTATE OIL PIPE LINE CO.

vs.

A. H. STONE, Chairman State Tax Commission

OPINION—Filed April 26, 1948

McGEHEE, J.

This is a suit wherein the appellant Interstate Oil Pipe Line Company seeks a refund of taxes in the sum of $25,326.63 which it paid on March 24, 1947, to the appellee A. H. Stone, Chairman of the State Tax Commission, for the period from January 1, 1944, to June 30, 1946, inclusive.

During the period aforesaid the appellant, a Delaware corporation which had qualified to do business in this State, owned and operated several pipe line systems for gathering crude oil from tanks on producing leases in numerous oil fields in Mississippi and transporting the same to some local shipping point on a nearby railroad where the same was in each instance transported in due time by the railroad company to an out of state destination.

The pipe line systems, respectively, consisted of pipes extending from a central or main line so as to connect with the oil tanks located on producing leases in the vicinity of the wells and thence to the loading racks or stations of the pipe line company adjacent to the railroad. At the oil tanks near the producing wells there were pumps installed by said com- [fol. 51] pany with which it pumped the oil from the tanks into its pipe line and then to the railroad, where it again pumped the same from its loading racks or tanks into the railroad tank cars as soon as such cars were "spotted" for that purpose.

The pipe line company made one charge of a few cents per barrel for pumping the oil from the lease tanks at the oil fields into its pipe line and thence to the railroad shipping point, the amount received for such service depending upon the distance to the railroad from each oil field, and then a

separate and additional charge of two cents per barrel for pumping the same from its loading racks or tanks, into the railroad tank cars. Of course, it received no part of the charges collected by the railroad company for transporting the oil across the state line to its destinations. In fact, it had no contractual relation with the railroad company in connection with the latter's said interstate transportation of such oil.

The privilege tax for operating these pipe line systems for transporting the oil from one point to another in this State as well as the Use tax on the use of the tangible personal property used in connection therewith were collected pursuant to assessments made after proper notices given and hearings had thereon in compliance with due process of law. The liability therefor is contested by the pipe line company on two grounds: (1) It contends that Sections 10105 and 10109, Code 1942, under which $20,296.63 of the amount involved was paid as a privilege tax for operating the pipe lines for transporting crude oil from one point to another in this State, and also Sections 10148 and 10149, Code 1942, [fol. 52] under which the remaining $5,030.27 was paid as a Use tax on its tangible personal property used in the operation of the pipe lines contain express exemptions against liability therefor under the admitted facts of the case; and (2) that the taxpayer's transportation of the oil was in interstate commerce, and that, therefore, the imposition of both of the taxes here in question violates the commerce clause of the Constitution of the United States, Article I, Section VIII, Clause 3 thereof, without regard to the alleged statutory exemption claimed in each instance.

The case was heard in the Circuit Court upon the pleadings and an agreed statement of the facts as to the method aforesaid whereby the business of the taxpayer was conducted in this State, and also as to the circumstances hereinafter mentioned under which it procured and brought into this State the tangible personal property used in the construction and operation of its pipe lines; and with the result that the trial court denied liability for the refund of all the taxes in question.

We are of the opinion that the Court was correct in disallowing a refund of the tax in the sum of $20,296.36, which had been collected for the privilege of operating the pumping machinery and other pipe line equipment in the trans-

portation of oil in the manner hereinbefore set forth, but that the Court was in error in disallowing a refund of the Use tax of $5,030.27, for reasons hereinafter stated.

We shall discuss the question of liability for these taxes respectively in reverse order. Section 10148, Code 1942, assesses and levies "a tax or excise for the privilege of use, * * *, of any article of tangible personal property" in this State, equal to 2% of the purchase price thereof; [fol. 53] and Section 10149, Code 1942, provides that "the tax levied by this act shall not be collected in the following instances: * * * (d) On the use * * * of tangible personal property used * * * in the furtherance of interstate transportation or interstate commerce, or on the use, * * * of any property * * *, which is not procurable in the ordinary channels of trade in the State of Mississippi * * *. And Section 10146, Code 1942, relating to this Use tax recites, among other things, that "the primary purpose of which (the statute) is hereby declared to be the imposition of a tax for the privilege of using, * * *, tangible personal property; * * *, and to protect, insofar as may be proved practicable, the merchants, dealers, manufacturers and persons engaged in businesses of rendering services in Mississippi, who operate under the privilege tax laws of this State, who pay the taxes imposed thereby, and who meet the requirements of the Mississippi sales tax laws, against the unfair competition of importation of goods and services into Mississippi without the payment of the retail sales tax imposed for the sale of goods, wares and merchandise usually carried for sale in this State, * * *."

It is agreed that $4,362.75 of the $5,030.27 was paid for the privilege of using tangible personal property in the construction and operation of the pipe line gathering system hereinbefore mentioned, and that the remaining $667.52 was paid for the privilege of using certain copper wire, glass insulators, fittings, hardware, brackets, lamps, screws, and other supplies in constructing a telephone system adjacent to *an interstate trunk pipe line* right-of-way separate and apart from the oil gathering pipe line systems herein- [fol. 54] before mentioned, and that the same was necessary to and used solely in connection with the *dispatching and movement of interstate shipments* and the servicing and maintenance of its said *interstate trunk line system.*

It is further agreed that the total amount of the said Use tax was computed and paid upon the purchase price of ma-

terial brought from without the State by the pipe line company "and that none of said property was available for purchase from stock piles in the State, but that all such materials were procurable from sales agents then operating in the State, who might have forwarded orders to suppliers located outside the State for shipment by said suppliers to appellant in Mississippi"; and from this factual situation we are asked to determine the question of whether or not such property was "procurable in the ordinary channels of trade in the State of Mississippi," and also whether or not the same was used "in the furtherance of interstate transportation or interstate commerce" by the pipe line company.

We do not think that the fact that such materials were procurable through sales agents then operating in the State who could have forwarded orders to outside manufacturers or dealers meant that such materials were "procurable in the ordinary channels of trade in the State of Mississippi." If merchants, dealers, manufactures and others engaged in businesses in this State could not supply the demand for this material, then there could be no "unfair competition" with them by non-residents engaged in manufacturing and selling the same, since the taxpayer had to resort to placing orders through such sales agents in the State to procure [fol. 55] the materials from manufacturers or dealers outside thereof. We are therefore of the opinion that under Section 10149 there could be no liability in the instant case for the Use tax whether the property was used "in the furtherance of interstate transportation or interstate commerce" or not, since the statute by its very language provides that the tax shall not be collected *either* on the use of tangible personal property used "in the furtherance of interstate transportation or interstate commerce" *or* on the use of such property "which is not procurable in the ordinary channels of trade in the State of Mississippi."

Except for the agreed statement of facts to the contrary, we would naturally assume that the enumerated articles for the use of which the said $667.52 was paid were procurable in the ordinary channels of trade in the State of Mississippi. However, that fact becomes immaterial here for the reason that it is further agreed, as hereinbefore shown, that such supplies were used in connection with the operation of *an interstate trunk pipe line* of the appellant taxpayer whereby it transported oil from the tanks on producing

leases on its ultimate and final passage from this State into other states in interstate commerce, such trunk line being operated entirely separate and apart from the oil gathering systems involved herein for transporting oil from one point to another in this State.

And referring further to the remaining $4,362.75 of the Use tax which was paid for the privilege of using the tangible personal property in the construction and operation of the oil pipe line gathering systems for transporting oil from one point to another in this State, it should be noted that aside from the fact that said property was "not pro-[fol. 56] curable in the ordinary channels of trade in the State of Mississippi" the same was *at least* used "in the furtherance of interstate transportation or interstate commerce" in which the railroad companies were engaged when transporting the oil on its ultimate journey from the local shipping points and cross the State line to its out-of-state destinations.

And now passing to the exemption claimed for the privilege taxes of $20,296.36 levied and collected for operating the pipe lines for transporting the oil from one point to another in this State, we find that Section 10105, Code 1942, levies annual privilege taxes, measured by the amount or volume of business done, on the basis of 2% of the gross income therefrom, or gross proceeds of sales, as the case may be, as follows: (1) Upon every person engaging or continuing within this State in the business of mining, etc., levied by Section 10106, of said Code; and (2) on every person engaging or continuing within this State in the business of manufacturing, etc., levied by Section 10107, of said Code; (3) on every person engaging or continuing in this State in the business of selling any tangible property whatsoever, real or personal, (not including, however, bonds or other evidence of indebtedness, or stocks) levied by Section 10108 of said Code; and (4) upon every person engaged or continuing within this State in the business of operating certain other public utilities, including those "operating a pipe line for transporting from one point to another in this State oil * * * through pipes or conduits in this State," levied by Section 10109 of said Code.

In the latter Section, which is now under consideration, there is included a tax on those operating numerous other public utilities insofar as the business done by them from [fol. 57] one point to another in this State is concerned, the

tax in each instance being measured by 2% of the gross income of such intrastate business. They too have paid ad valorem, franchise and other taxes paid by this pipe line company in addition to the privilege tax levied by the statute here involved.

And Section 10109, supra, expressly excepts from the gross income of all these public utilities, used in determining the measure of the tax, so much thereof as is derived from commerce between this and other States, "which the State of Mississippi is prohibited from taxing under the Constitution of the United States of America."

By the above exception the Legislature seems to have recognized that many of the utilities enumerated in said Section of the Code are engaged in both intrastate and interstate commerce, that all activity in the State having a relation to interstate commerce is not exempt from bearing its share of local taxation by the commerce clause of the Federal Constitution, and by thus excepting from the gross income used in determining the measure of the tax so much thereof as is derived from business conducted in commerce between this and other States "which the State of Mississippi is prohibited from taxing under the Constitution of the United States of America" it was made known that it was not the purpose of the Legislature to attempt to burden interstate commerce *as such* by the levy of a tax measured by a percent of the gross income derived therefrom.

It is the uniform rule laid down by all of the Courts that tax exemption statutes should be strictly construed and that when any doubt arises as to whether or not an exemption is granted by such statute the doubt must be resolved against [fol. 58] the exemption. The citation of authorities in support of this principle is deemed unnecessary.

It is to be conceded, however, that in considering the privilege tax imposed by Sections 10105 and 10109, supra, here in question, which as a matter of convenience and best available means of fixing the amount thereof is to be measured by a percent of the gross income of the business done by the taxpayer, any reasonable doubt as to whether or not the business done by the taxpayer can be detached in its main and essential feature as a local activity must be resolved in favor of the taxpayer in connection with the said requirement that when the taxpayer is relying upon an exemption the claim of non-liability is to be clearly sustained under the proven facts in the light of the burden of proof

resting upon the taxpayer to establish that the case comes within such exemption.

If the exemption was intended to apply under the facts of the instant case, then the levy of the tax on the privilege of operating a pipe line for the transportation of oil from one point to another in the State could have served no useful purpose, since it was known that all of the oil transported by pipe line from producing leases or elsewhere would be transported to destinations outside the State either by interstate trunk pipe lines, on a continuous journey, or likewise by railroad from local shipping points within the State. If by the former method, it would of course constitute that character of commerce "which the State of Mississippi is prohibited from taxing under the Constitution of the United States," and this would be equally true as to the movement [fol. 59] by rail of oil from a local shipping point to its destination outside the State in crossing the state line. Hence, the statute was designed only for the purpose of taxing the privilege of operating a pipe line for transporting the oil from one point to another in the State where it is then delivered to an interstate carrier prior to the beginning of its ultimate passage to a foreign state in interstate commerce. Most assuredly, no pipe line company would be deemed justified in installing an oil gathering system to transport oil other than that destined for ultimate interstate shipment, there being no oil refineries here.

During the period for which these taxes were collected, the taxpayer as heretofore stated was transporting some oil from within the State to outside destinations by an interstate trunk pipe line, and subsequent to the expiration of the said two and a half year period in question it has transported practically all of the oil handled by it for the owners and shippers thereof by means of oil tank pipe lines to out of state destinations, and for which particular activity no tax has ever been demanded or collected. The entire tax collected, and for which a recovery is sought herein was measured by a per cent of gross receipts of the business done in transporting oil from one point to another in this State through its local oil gathering systems and for loading the same into railroad tank cars as hereinbefore described. Therefore, it appears that insofar as its own activities in that regard and the services of its employees in this State in that behalf were concerned, this pipe line company was an intrastate carrier. It transported no oil across the State

line in the operation of such local pipe lines, that is to say, the essential and controlling feature of its business from which the tax in question was collected was the transporta-
[fol. 60] tion of oil from one point to another in intrastate commerce. It was not employed or hired to transport oil to any destination outside the state, but only to transport the same to the railroad and then pump it into the railroad tank cars as a local activity, insofar as the right of taxation of its privilege of operating the intrastate pipe line is concerned.

It is agreed that the said taxpayer received the oil at the leased tanks at or near the place of production under a "tender of shipment" from the owner, supplied by the taxpayer, which showed the consignee and ultimate destination thereof to be outside the State, etc., and it thereafter obtained for such owner from the railroad company a bill of lading at the time the same was delivered to such interstate railroad carrier. But "it is not within the power of the parties by the form of their contract to convert what is exclusively a local business, subject to state control, into an interstate business, protected by the commerce clause". 11 Am. Jur. p. 29. And to the same effect is the rule announced in 15 C. J. S. p. 278. In other words, neither the form of contract nor method of billing is controlling on the question of whether the pipe line company was employed to do more than render a local service for the owner of the oil by pumping the same out of the lease tanks and through its pipe line to where it could be later pumped and loaded by said company into the railroad tank cars to be started on its ultimate interstate passage.

In 51 Am. Jur., Section 205, page 266, it is said: "It is generally held that a movement merely in preparation for export—in other words, a mere transfer of the property to a
[fol. 61] depot or other place within a state from which the transportation or journey to another state is to begin at a convenient time—is not a part of that transportation, so as to exempt the property because of such transfer movement from state taxation upon the ground of the interference or burden upon interstate commerce." Numerous authorities are cited to support this announcement, including the case of Coe v. Errol, 116 U. S. 517, 29 L. Ed. 715, wherein the Court said: "But this movement (in interstate commerce) does not begin until the articles have been shipped or started for transportation from the one State to the other. The

carrying of them in carts or other vehicles or even floating them to the depot *where the journey is to commence*, is no part of that journey * * *. Until actually launched on its way to another state or committed to a common carrier for transportation *to such state*, its destination is not fixed and certain. It may be sold or otherwise disposed of within the state and never put in course of transportation out of the State. Carrying it from the farm or the forest to the depot is only an interior movement of the property entirely within the state, for the purpose, it is true, but only for the purpose, of putting it into a course of exportation; it is no part of the exportation itself. Until shipped or started on its final journey out of the state, its exportation is a matter altogether in fieri and not at all a fixed and certain thing." (Italics ours) Here the oil was not committed by the owner to this pipe line company for transportation to another state, but to be transported to the railroad and there loaded into tank cars.

In the instant case, the owner of the oil could have directed the pipe line company as its agent to divert the pro-[fol. 62] posed shipment from its intended out-of-state destination and caused it to be shipped to the Gulf Coast of the state, to be sold there, or so as to otherwise prevent its interstate transportation, and to obtain a bill of lading to that end, instead of procuring for the owner a bill of lading to the originally contemplated out-of-state destination, and this could have been done without working a breach of the tender of shipment under which the pipe line company had received the oil, since the interest of the said pipe line company, unlike that of the railroad company, could not be affected one way or the other by the diverting of the shipment, for the reason that the pipe line company was to receive no part of the charges to accrue after the oil was loaded into railroad tank cars for its final destination.

The said tender of shipment provided, among other things, that the "crude petroleum accepted for gathering and transporting shall be subject to a lien for all such (tariff) charges (for transporting the oil to the railroad and loading the same), and said lien shall attach to any crude petroleum not yet delivered to destination for all unpaid charges arising hereunder on the crude petroleum covered by the same tender".

It is to be conceded that the lien above mentioned, as well as the local activities of this taxpayer in the operation of

its pipe line for transporting oil from one point to another in this State, together with its tangible personal property employed in the operation of said business, enjoys the protection of the state laws. Also, that the particular tax here under consideration is not a tax on a commodity in transit. Nor is it a direct tax upon such gross receipts. It is a tax on the local business of operating the pipe line, and as here-[fol. 63] tofore stated the amount thereof is measured by 2% of the gross receipts derived therefrom, as a matter of convenience. That is to say, it is merely a tax on the privilege of engaging in a local activity insofar as this taxpayer was concerned. Moreover, it is not measured by a percent of the entire gross income received from the transportation of the oil from the tanks on the producing leases to its out of state destination, since the gross income received by the railroad company for transporting the oil on its ultimate journey beyond the State in interstate commerce is no part of the measure of the tax.

It may be also conceded for the purpose of this decision, but without admitting that the pipe line company is engaged in interstate commerce, that there is no appreciable interruption at the railroad shipping point in the continuity of the transportation of the oil from the tanks on the producing oil leases to its out of state destinations, though it is pumped from said tanks to the railroad under a tender of shipment, furnished to the owner by the pipe line company, to where it reaches the loading racks or stations on the railroad and is thence later, as soon as cars arrive, shipped by rail out of the State under a bill of lading obtained from the railroad company by the pipe line company as agent of the owner of such oil.

In the case of Stone *v.* Memphis Natural Gas Co., —— Miss. ——, 29 So. (2d) 268, this Court upheld "a franchise or excise tax" levied and assessed by Section 9314, Code 1942, against the said gas company, a Delaware corporation which had not even qualified to do business in this State, and where the stipulation of facts stated that the said "appellee company is not, and has not been, engaged in any intrastate commerce in Mississippi, but that its business, so far as concerns this State, has been interstate solely and ex-[fol. 64] clusively; that it has only one customer in the State, and to this customer it delivers gas wholesale, under a contract made in another State."

The said gas company then owned and operated a natural gas pipe line running from the Monroe gas field in Louisiana to Memphis, Tennessee, and beyond, entering Mississippi south of Greenville and extending for a distance of approximately 135 miles through this State, along which line it maintained two compressing stations in this State. The contention made in that case was that no tax of any kind could be levied by the State of Mississippi against the pipe line company other than the ad valorem taxes which it had already paid, and that any other tax, and particularly a franchise tax, would be to tax interstate commerce.

While the tax upheld in that case was a franchise tax as distinguished from the privilege tax involved in the case at bar, it was nevertheless a tax on the right and privilege of exercising its corporate powers and enjoying the protection of the state laws in the use and maintenance of its property for the conduct of its business, and we are of the opinion that what was said by the court in sustaining the tax was in keeping with the modern trend of the decisions of the Supreme Court of the United States upon the right of a State to require one whose property and business enjoys the protection of local laws to bear its proper share of the expense of the State government, where the tax is non-discriminatory and does not constitute a *direct* burden on interstate commerce; and of which modern trend we have ample evidence in what was said in the case of McGoldrick *v.* Berwind-White Coal Co., 309 U. S. 33, 84 L. Ed. 565, even though the factual situation in that case was likewise different to that involved in the case at bar.

[fol. 65] In this connection we said in the case of Stone *v.* Memphis Natural Gas Co., supra.

"It is to be seen that there is no attempt to tax interstate commerce as such, but the levy is an exaction which the State requires as a recompense for its protection of lawful activities carried on in this State by the corporation, foreign or domestic, activities which are incidental to the powers and privileges possessed by it by the nature of its organization—here the local activities in maintaining, keeping in repair, and otherwise in manning the facilities of the system throughout the 135 miles of its line in this State." We then cited Stone *v.* International Natural Gas Co., 308 U. S. 522, 84 L. Ed. 442; Stone *v.* General Contract Purchase Corp., 193 Miss. 301, 312, 7 So. (2d) 806; and Stone *v.* General Elec-

tric Contracts Corp., 193 Miss. 317, 7 So. (2d) 811; and further observed that:

"It has often been observed in times past that interstate commerce should pay its way, should be made to bear a fair share of the cost of local government whose protection it enjoys, but outside of ad valorem taxes and until recently most efforts to make it pay its way have met with failure. In late years, however, there is a tendency to uphold local taxation when it does not bear directly upon interstate commerce as commerce, or when indirect, it had no substantial effect to block or impede the free flow of such commerce.

"And more recently there has been a pronounced trend that, in order to make a more reasonable accommodation between local needs and the dominant requirement of freedom in the national commerce, recognition shall be given to [fol. 66] a rule as follows: That although a particular activity may be essential to the continued full and unimpeded flow of commerce between the states as regards a particular commodity or other matter of such commerce, yet if that activity is of a substantial character, and is one which actually and distinctly happens in the particular State and must be, and is, protected by that State regardless of the ultimate purpose of the activities, then for the purpose of laying a tax as a recompense for the local protection afforded, the State may detach the activity so long as the exaction on account of it is not made a pretext to impose a burden which would have the effect, beyond that which is remote or unsubstantial, to interfere with the national interests."

The fact that the imposition of a state tax adds to the cost of interstate commerce is not alone sufficient to invalidate the tax as an interference with that commerce. 51 Am. Jur., Sections 203, 207; pp. 264, 270, citing McGoldrick *v.* Berwind-White Coal Mining Co., supra, and other cases, among which is the case of Colverdale *v.* Arkansas-Louisiana Pipe Line Co., 303 U. S. 604, 82 L. Ed. 153.

In the case of Dunston *v.* City of Norfolk, 15 S. E. (2d) 86, (Va.), the Court said:

"Finally, the Supreme Court of the United States has declined to deny to the States the right to levy a tax upon interstate commerce merely because it is such commerce. The latest cases recognize and admit the right of the States to require such commerce to bear its fair share of the cost of local government, notwithstanding the fact that the exercise of such right may, in some measure, affect the com-

merce or increase the cost of doing business. They declare that the purpose of the commerce clause is to allow inter-[fol. 67] state commerce to compete on a fair and equal basis with local commerce. * * *

"The change of interpretation thus evidenced was more fully enlarged and amplified, in 1940, in the three cases of McGoldrick *v.* Berwind-White Coal Mining Company, 309 U. S. 33, 60 S. Ct. 388, 84 L. Ed. 565, 128 A. L. R. 876; and McGoldrick *v.* Felt & Tarrant Manufacturing Company and McGoldrick *v.* Du Grenier, Inc., 309 U. S. 70, 60 S. Ct. 404, 84 L. Ed. 584, sometimes referred to as the New York City Sales Tax Cases."

The general rule is announced in 51 Am. Jur., Sec. 204, p. 264, that "the commerce clause of the Federal Constitution affords immunity to property from local taxation when, but only when, it is in transit as interstate or foreign commerce," citing Champlain Realty Co. *v.* Brattleboro, 260 U. S. 366, 67 L. Ed. 309, and numerous other cases. But here the tax is not on any property in transit as interstate commerce or otherwise, but it merely on the privilege of operating a pipe line wholly within this State as a local activity. It is not on the owner or shipper of the oil. Nor is it a direct tax on the gross receipts from either the activity of the pipe line company or the interstate transportation by the railroad company, but rather a tax on the privilege of doing an intrastate business, and measured by a percent of gross income as a matter of convenience. It only indirectly affects the commerce.

Moreover, the tax would be equally applicable to a domestic or foreign corporation engaged in such activity or in transporting oil by pipe line from tanks on producing leases to an oil refinery, should there be one in the State, whether [fol. 68] the oil was ultimately transported in interstate commerce or not, and therefore the taxing statute in no manner discriminates against interstate commerce, and it only incidentally and indirectly affects the same.

In McGoldrick v. Berwind-White Coal Mining Co., supra, the Court said: "Forms of state taxation whose tendency is to prohibit the commerce or place it at a disadvantage as compared or in competition with intrastate commerce and any state tax which discriminates against the commerce, are familiar examples of the exercise of state taxing power in an unconstitutional manner, because of its obvious regulatory effect upon commerce between the states. But it was not the

purpose of the commerce clause to relieve those engaged in interstate commerce of their just share of state tax burdens, merely because an incidental or consequential effect of the tax is an increase in the cost of doing the business . . . Not all state taxation is to be condemned because, in some manner, it has an effect upon commerce between the states, and there are many forms of tax whose burdens, when distributed through the play of economic forces, affect interstate commerce, which nevertheless falls far short of the regulation of the commerce which the Constitution leaves to Congress."

We quoted the above language with approval in Stone v. General Electric Contracts Corp., 193 Miss. 317, 7 So. (2d) 811. In that case we also cited State of Wisconsin v. J. C. Penney, 311 U. S. 435, 85 L. Ed. 267, wherein it was said: "A state is free to pursue its own fiscal policies, unembarrassed by the Constitution, if by the practical operation of a tax the state has exerted its power in relation to opportuni- [fol. 69] ties which it has given to protection which it has afforded, to benefits which it has conferred by the fact of being an orderly, civilized society."

We are of the opinion that the case of Carson Petroleum Co. v. Vial, 279 U. S. 95, 73 L. Ed. 626, and other similar cases such as those reviewed in the annotation contained in 171 A. L. R. at page 283, et seq., and some of which are relied upon by the appellant, are to be distinguished from the instant case in that they involve only the question of whether or not a property tax—for ad valorem purposes—could be imposed upon a commodity which is temporarily interrupted in transit for a change in the mode of transportation and where the same does not remain in the taxing state long enough to acquire a situs therein for ad valorem taxation purposes. They do not involve the right of the State to exact a tax upon the *privilege of engaging in the local activity* of rendering services wholly within the taxing state for hire, such as operating pumping machinery and pipe lines for the transportation of commodities from one point to another in the State.

Moreover, in the Carson Petroleum Company case, supra, the oil was purchased outside of Louisiana, shipped into that state to a storage place and was awaiting the arrival of ships for its transportation to foreign countries. There was no question about the property being in transportation

in interstate commerce and the ad valorem tax sought to be assessed was against the owner of the oil where the same remained at the storage place only long enough for a change in the mode of transportation, and for an insufficient time to acquire a situs in Louisiana for ad valorem taxation [fol. 70] purposes.

The Court decisions, state and federal, cited both on behalf of the taxpayer and the Tax Commission are too numerous for discussion and analysis in an opinion of justifiable length, but we think that when each of them are viewed in the light of their particular facts it will be found that the more recent cases sustain the view that the commerce clause of the Federal Constitution does not deny to the State the right to tax the privilege of engaging in a local activity such as is here involved.

The decision of the trial court will, therefore, be affirmed wherein it upheld the tax collected for operating the pipe lines in question and reversed wherein it upheld the Use tax on the use of the property employed in the operation of said pipe line business, and a judgment here will be entered accordingly.

Affirmed in part, reversed in part and judgment accordingly.

Alexander, J. took no part in this decision.

[File endorsement omitted.]

[fol. 71] IN THE SUPREME COURT OF MISSISSIPPI

In Banc:

No. 36,672

INTERSTATE OIL PIPE LINE CO.

vs.

A. H. STONE, Chairman State Tax Commission

OPINION OF GRIFFITH, J., DISSENTING IN PART—Filed April 26, 1948

Under the precise facts as disclosed by this record I am of the opinion that all the activities here in question were interstate in character and that none of the tax here sought

to be imposed could be lawfully collected. The authorities which support that view will appear in the reporter's abstracts and will not be further referred to here.

Smith, L. A., Sr., J., concurs in this dissent.

[File endorsement omitted.]

[fol. 72] IN THE SUPREME COURT OF MISSISSIPPI

No. 36,672

INTERSTATE OIL PIPE LINE CO.

vs.

A. H. STONE, Chairman etc.

JUDGMENT—April 26, 1948

This cause having been submitted at a former day of this term on the record herein from the Circuit Court of Hinds County and this court having sufficiently examined and considered the same and being of the opinion that there is partial error therein doth order and adjudge that the judgment of said Circuit Court rendered in this cause on the 28th day of July 1947, be and the same is hereby affirmed wherein it upheld the tax collected for operating the pipe lines in question and reversed wherein it upheld the Use Tax on the use of the property employed in the operation of said pipeline business. It is therefore ordered and adjudged that judgment of said lower court is hereby affirmed insofar as it denied recovery of the tax collected for operating the pipe lines in question but reversed as to the other feature and this court now here proceeding to render and enter the judgment that should have been entered in the court below doth order and adjudge that the appellant, Interstate Oil Pipe Line Company do have and recover of and from A. H. Stone, Chairman State Tax Commission the sum of $5,030.27 the amount of the Use tax paid under protest together with interest thereon at the rate of 6 per centum per annum from the date paid under protest to the date of its payment to the appellant. It is further ordered and adjudged that the costs of the Clerk of this court be paid out of the appropriation provided for cases in which the State Fails.

[fol. 73] [File endorsement omitted]

IN THE SUPREME COURT OF MISSISSIPPI

[Title omitted]

SUGGESTION OF ERROR BY APPELLEE—Filed May 25, 1948

I consider the majority opinion rendered in this cause, with reference to liability of the appellant for the Sales Tax paid on its activity within the state in transporting oil by pipe line from one point in the state to another point in the state, as eminently correct. But the reason given for holding that the amount of the Use Tax paid was not due will be very harmful, being based upon a construction of the law which is contrary to the uniform construction placed upon said statute by the Commissioner. Although this construction, by the Commissioner, has been uniformly acquiesced in by all persons to which said statute applied, for the more than six years that the law has been in force. And the effect that said construction is having on pending claims for Use Tax, as well as the indicated claims for refunds that will be filed for Use Tax already paid, if said rule announced by this Court is maintained, is of such vital importance to the state and will affect the finances of the state to such great extent in the future, by reason of the inability of the Commissioner to collect Use Taxes, as well as the enormous claims that will be filed for the taxes already collected, prompts me to suggest to the Court [fol. 74] that the basis of the decision with reference to Use Tax is erroneous, and should be either set aside or amended so as to avoid the dire consequences which are bound to result if such language of the Court is allowed to remain in force.

I make specific reference to the language of the Court which is as follows:

> "We do not think that the fact that such materials were procurable through sales agents when operating in the State who could have forwarded orders to outside manufacturers or dealers meant that such materials were 'procurable in the ordinary channels of trade in the State of Mississippi'."

The language of the statute construed, which is Subsection (d) of Section 4 of the Code "which is not procurable in the ordinary channels of trade in the State of Mississippi" was intended to cover such tangible property as would not be purchased by the ordinary citizen or business conducted in the State, in such quantities as to justify the stocking of such merchandise in advance of orders therefor. Indeed, the language was used for the express purpose of indicating that any article not usually carried in stock in this state, would yet be taxable for its use within the state, if the usual or customary channels or methods by which such articles were procured were available, even though the nature of such articles was such that it would not be practicable to attempt to *to* anticipate certain wants and have on hand the merchandise with which to fill any order or request for articles the nature of which did not permit the keeping thereof in stock to supply the peculiar desires of potential purchasers.

[fol. 75] There are numbers of agencies within the state, some of which are representatives of manufacturers, and others being agents who have qualified as dealers in the products of certain manufacturing plants, for the sale of equipment and articles which are peculiar to the operation in oil fields. And I am informed from various sources that it is a fact that the character and varying conditions necessary to proper equipment for oil operations, at least, are so varied that no effort is made for stocking in any quantity the various materials required in the operation of oil production. And no independent dealer in such commodities ever attempts to keep in stock, either in this state or anywhere else, a sufficient variety and quantity of the various materials used in oil production, except the mills where such materials are manufactured. Indeed, I understand that the regular business of selling "Drilling Rigs" contemplates and requires the placing of orders by the seller with many different manufacturers who produce separately derricks, drill stems, drills, pumps of various kind, and the many other accessories which combine to make a complete drilling rig. I am informed that in some instances orders would have to be placed with at least twenty different manufacturers to procure all the material necessary to furnishing a drilling rig. And yet, there are many agencies in Mississippi who will accept

orders for and supply a complete drilling rig to any purchaser thereof.

In view of the fact that the term "procurable in the ordinary channels of trade" seems to have been an expression coined by the Legislature for the expression of its own intention, and there are no cases in the books where the phrase, as a whole, has ever been construed, by the Courts or the text writers, it is necessary to analyze the term in order to ascertain the legislative intent.

In Webster's New International Dictionary, the term [fol. 76] "ordinary" is defined as "belonging to what is usual; having or taking its place according to customary occurrence or procedure; usual; normal."

In "Words and Phrases", Volume 30, there are a number of decisions cited in explanation of the meaning of the word "ordinary". For instance, in the case of Central Hannover Bank & Trust Company v. Nisbet, 186 A. 643, the Supreme Court of Connecticut defined the word in the following language:

> "The word 'ordinary' means common, customary, usual."

In the case of Zulich v. Bowman, 42 Pac. 83, and in the case of State v. O'Connor, 49 Me. 594, the word was defined as follows:

> "The word 'ordinary,' a synonym of 'regular' is defined by Webster as methodical, regular, according to established order."

There are numerous other cases cited which give the composite definition of the word "ordinary" as "methodical, regular, according to established order, common, usual, often recurring."

It is manifest, therefore, since all of the cases in the books have a uniform definition of the word "ordinary", that the Legislature used said word in its usual sense. And it is only necessary then to define the additional word of "channel". And the word "channel" has been variously defined in the several text books as follows:

> "The term 'channel' has been said to be a generic term, and its truest meaning depends upon the context in which it is used. Usually meaning a direction of course or means by which something is conveyed,

[fol. 77] as the channel of a stream; the means by which news is conveyed, or any other process by which movement is controlled or regulated".

The natural conclusion to reach, therefore, is that the Legislature used said phrase for the purpose of excluding from the property the use of which is taxable when brought into the state, only such articles as are so seldom used or purchased for use in this State that there are no means or agencies through which same might be procured. The expression generally used by the Commissioner in defining said term being "locomotives, brass cannons, steam ships" and other articles, the use of which in the State of Mississippi would not be anticipated, would be the only items which are intended to be excluded from taxable property brought into the state, which in the ordinary course of events would never be desired to purchase by a person within the State of Mississippi.

The Mississippi Use Tax Law is to all intents and purposes identical with the similar law of the State of Iowa. The Iowa statute expresses the thought intended to be conveyed by the phrase "not procurable in the ordinary channels of trade", by the term "not ordinarily obtainable in Iowa", and this term has been construed by the Supreme Court of Iowa in the case of Peoples Gas & Electric Company v. State Tax Commission, reported in 28 NW (2d) at page 799. The Iowa statute likewise contains a provision authorizing the Commissioner to promulgate rules and regulations for the purpose of defining certain terms and supplying the definition in the language of the statute itself, in determining its specific meaning.

In construing said provision of the Iowa Law, the Supreme Court of Iowa in the Peoples Gas & Electric Company case, supra, stated that the use of the phrase was [fol. 78] intended to distinguish certain materials from the "materials and equipment not manufactured or stocked in Iowa which were of a character not to be regularly stocked in Iowa, but which were regularly sold by Iowa dealers as a normal part of their business".

And this further language of the Iowa Court in said case fully explains the sense in which the language contained in the Mississippi statute and the Iowa statute of similar import, is intended to cover. The Iowa Court used the following language in holding that certain property was tax-

able when brought into the state, although not regularly carried for sale in the state, but said that the tax would apply to:

> "Materials and equipment not stocked in Iowa, when factory branches, resident agents or salesmen, or jobbers or dealers in Iowa were regularly engaged in selling the same or comparable materials and equipment in Iowa as a normal part of their business".

The development of oil production in Mississippi has brought about this exact situation, which is covered by the language of the Iowa Court last quoted. There are at least ten or more of the principal manufacturers of oil field equipment who have established branch offices, and appointed qualified agents within the State of Mississippi, for the express purpose of accepting orders for the various kinds of equipment necessary in drilling for oil and handling oil after same is produced. But none of said agencies or dealers undertake to keep in stock the vast amount of materials of such variety and bulk to be able to supply orders for large quantities of such equipment which may become necessary to be used in the oil operations in Mississippi.

Many of the dealers and agencies now operating in Mis- [fol. 79] sissippi for the sale of oil field equipment are Mississippi dealers who have qualified to sell supplies necessary in the increasing operation of oil industry in Mississippi, and all of such dealers accept orders to be filled in the same manner as orders are filled when produced by the branch offices of manufacturers of such commodities now operating in Mississippi. And to hold that all such properties may be shipped into the state on orders procured in the state, or which are not carried in a stockpile within the state, free of tax, would be to discriminate against the local dealers who have uniformly paid the Sales Tax on such property as they have accepted order for, as a local dealer, even though shipment and delivery may be made from the mills without the state where all such orders are filled, without reference to whether the order is taken by a permanent dealer within this state, or by a traveling representative of a manufacturer who has no place of business within this state.

In the opinion of this Court it is stated:

> "If merchants, dealers, manufacturers and others engaged in businesses in this State could not supply the

demand for this material, then there could be no 'unfair competition' with them by nonresidents engaged in manufacturing and selling the same, since the taxpayer had to resort to placing orders through such sales agents in the State to procure the materials from manufacturers or dealers outside thereof. We are therefore of the opinion that under Section 10149 there could be [fol. 80] no liability in the instant case for the Use Tax whether the property was used "in the furtherance of interstate transportation or interstate commerce" or not, since the statute by its very language provides that the tax shall not be collected *either* on the use of tangible personal property used 'in the furtherance of interstate transportation or interstate commerce' *or* on the use of such property 'which is not procurable in the ordinary channels of trade in the State of Mississippi.'"

The Supreme Court of Iowa in the case of Peoples Gas and Electric Company, supra, clearly stated the rule, which to my mind definitely answers the statement of the Court just quoted from, and gives a very clear and cogent conclusion as to the purpose of the act and the result of purchases of the character mentioned, the language of the Court being as follows:

"If the Use Tax Act was enacted to protect Iowa stocks the answer might well be in the negative. But the Use Tax Act was not designed to protect Iowa stocks. All authorities agree it was designed to protect the Iowa retailer. If the Iowa retailer regularly sells in Iowa (in whole or in part) from a stockpile outside of Iowa, such sales are subject to the Iowa Sales Tax. It matters not whether such sales are made from his own stockpile or that of another. In either event [fol. 81] they are subject to the Sales tax act. The Use Tax Act was designed to give him as much protection against ruinous competition from out of state sellers with a two per cent advantage as any other Iowa retailer. The failure to tax such purchases would drive such retailers out of business and thus open loopholes in the sales tax which the Use Tax Act was designed to plug."

There is another feature of the Use Tax Law of Mississippi which adds emphasis to the fact that tangible property shipped into the state by nonresident dealers on orders taken within the state are taxable, the same being the provisions of Section 6 of Chapter 120, Laws of 1942, being Section 10451 of the Code of 1942, said provision being as follows:

> "Every person maintaining a place of business in this state and making sales of tangible personal property for use in this state, or rendering services in this state for which a tax is imposed and not exempted under the provisions of this act, shall at the time of making sales or rendering such services, whether within or without the state, collect the tax imposed by this act from the purchaser".

And another provision contained in Section 2 of the Act, under the head of "Definitions", the same being Section 10147 of the Code of 1942, defines the term "every person [fol. 82] maintaining a place of business in this state" in the following language:

> "The term 'retailer maintaining a place of business in this state' or any similar term, shall mean and include any retailer, distributor, wholesaler or manufacturer or person in business of rendering a service, having or maintaining within this state, directly or by a subsidiary, an office, distribution house, sales room or house, warehouse or other place of business, or any agent operating within the state under the authority of the retailer, distributor, wholesaler or manufacturer, or person in business of rendering a service, or their subsidiaries, irrespective of whether such place of business or agent is located within this state permanently or temporarily, or whether such retailer, distributor, wholesaler, or manufacturer, or person in business of rendering a service, or his subsidiary, is admitted to do business within this state under its general laws."

The result of this provision in the Use Tax Law of Mississippi has been construed by the Supreme Court of the United States in the case of General Trading Company v. State Tax Commission of Iowa, reported in 322 US at page 335, the Court having under consideration the identical provision of the Iowa statute to the provision just quoted from

[fol. 83] in the Mississippi Law. And in answer to the contention that the State of Iowa would have no authority to impose the duty of collecting the tax from the seller out of the State of Iowa, as well as the question of liability of the Iowa purchaser, the Court used the following language, after quoting the statutes of Iowa which are in all respects identical with the statutes of Mississippi just quoted:

"The application by that Court of its local laws and the facts on which it founded its judgment *are of course controlling here.* From these it appears that General Trading Company had never qualified to do business as a foreign corporation in Iowa nor does it maintain there any office, branch, or warehouse. The property on which the use tax was laid was sent to Iowa as a result of orders solicited by traveling salesmen sent into Iowa from their Minnesota headquarters. The orders were always subject to acceptance in Minnesota whence the goods were shipped into Iowa by common carriers or the post. Upon these facts and its holding that Trading Company was a 'retailer maintaining a place of business in this state' within the meaning of the Iowa statute, the Iowa Supreme Court held that Iowa had not exceeded its powers in the imposition of this use tax on Iowa purchasers, and that collection could validly be [fol. 84] made through the Trading Company.

"We brought the case here, 320 U. S. 731, to meet the claim that there was need for further precision regarding the scope of our previous rulings on the power of States to levy use taxes. In view, however, of the clear understanding by the Court below that the facts we have summarized bring the transaction within the taxing power of Iowa, there is little need for elaboration. We agree with the Iowa Supreme Court that Felt & Tarrant Co. v. Gallagher, 306 U. S. 62; Nelson v. Sears, Roebuck & Co., supra; and Nelson v. Montgomery Ward & Co., supra, are controlling." (Emphasis supplied).

The case of General Trading Company v. The State Tax Commission of Iowa, supra, has been the leading case on this question since the original decision thereof, and said case, as a leading case, is reported in 153 ALR at page 602. And in a voluminous annotation to said case, as reported in 153 ALR, many other cases are cited showing the trend

of the decisions of all of the courts on this subject. And under the heading "Subjects of Tax", the following language appears which is positive authority for the imposition of the tax sold in the manner in which most of the property is sold in the oil operation in the State of Mississippi, the language referred to being as follows:

> [fol. 85] "So, it was held in State Tax Commission v. General Trading Co. (Iowa) (reported herewith) ante, 602 (affirmed in 1944) 322 US 335, 88 L. ed. (Adv. 914 917), 64 S. Ct. 1028, 1030), that a foreign corporation which had never qualified to do business as such in Iowa, and which did not maintain there any office, branch, or warehouse, but which took orders from Iowa purchasers through traveling salesmen operating within the state, whose orders were subject to acceptance at the corporation's store in Minnesota, the property subsequently being delivered upon said orders in interstate commerce to the purchasers in Iowa, ther-by became a 'retailer maintaining a place of business in this state' and therefore required to collect and pay the state a use tax of 2 per cent upon the merchandise so sold, where the statute provided that a 'retailer maintaining a place of business in this state' should include 'any retailer having . . . within this state . . . any agent operating within this state under the authority of the retailer . . . irrespective of whether such . . . agent is located here permanently or temporarily, or whether such retailer . . . is admitted to do business within this state'."

[fol. 86] As evidence of the fact that the commercial world has recognized and accepted the rule announced in the case of General Trading Company, supra, as a proper construction of the Use Tax Law, is the fact that not only have the purchasers of merchandise within the state, who receive tangible property ordered from without the state recognized their liability therefor, but have acquiesced in the uniform practice of the nonresident sellers to add the Use Tax to the price of the merchandise sold and have paid to the sellers, in most instances, the tax, which, in turn, is reported and paid to the Tax Commission monthly. Indeed, the records of the Use Tax Division indicate that reports are received and Use Tax paid from sellers in the majority of the states of the union, as far North as New York, Illinois, and even

the State of California. And the records of the Use Tax Division of the State Tax Commission show that during the last three years, the total collection of Use Tax from persons who have purchased oil field equipment alone and brought same into the state for use, have paid in the aggregate, $478,572.53, most of which represents the tax on materials shipped into the state for use therein, on orders taken by local representatives of manufacturers or local dealers who have entered into the business of accepting orders for such material which is not carried in stockpiles within the state.

In addition to the amount hereinbefore mentioned, which was taken from reports of Use Tax sales, a large amount of taxes, almost equal to the figures given, have been uniformly paid by the local dealers in oil field supplies, who have added the tax to the invoice price of the merchandise sold, when all of such merchandise is shipped from without the state, [fol. 87] but the Sales Tax was added because the contract for such sale being consummated in the state was recognized as intrastate sales, and liable for the Sales Tax under the holding in the cases of Banker Brothers v. Pa., 222 U. S. 210 and Willoil Company v. Pa., 294 U. S. 169. And said cases definitely established the rule that when a contract of sale is consummated between the purchaser and the seller within the state, that it was an intrastate sale, subject to Sales Tax, without reference to how the merchandise was delivered, or the fact that same may have been shipped from without the state.

It must be noted that the appellant in this case did not depend upon the provision "not procurable in the ordinary channels of trade in Mississippi" for the exemption claimed on the Use Tax. But the appellant relied solely on its contention that it was engaged in interstate commerce in claiming exemption from the Use Tax Law. The quotation of the provision relied upon, Sub-section (d) of Section 10149 of the Code of 1942, being for the sole purpose of invoking the exemption on the basis that the property involved was "used or consumed in the furtherance of interstate transportation or interstate commerce," and the other provision of said sub-section with reference to the property not being procurable in the ordinary channels of trade appeared only as part of the quoted statute. But the appellant did not urge either in its hearings before the Tax Commission, or in the lower court, that said last mentioned provision was a basis for the claim to exemption.

There is also a provision in the Sales Tax Law of Mississippi by which property "used or consumed in the furtherance of interstate commerce" is only taxed at the wholesale rate. And all taxpayers actually engaged in interstate commerce have only claimed the benefit of the quoted provision in either the Sales Tax Law or the Use Tax Law when the [fol. 88] property involved was used or consumed in actual conduct of interstate business. Indeed, it is my understanding that this appellant made no claim to exemption from the Use Tax Law on any other theory than that under which exemption was claimed from the Sales Tax Law, than that they were actually engaged in interstate commerce. And, in effect, agreed that unless it should be held by this Court that their activities were actually in interstate commerce, it had no claim to any exemption whatever on either the Sales Tax Law or the Use Tax Law.

The holding of the Court that the tax would not be due if the property bought could not be obtained from a stockpile in Mississippi, not only caused the many taxpayers who had previously paid the Use Tax on merchandise imported into the state without question to decline to make any further payments of Use Tax, but brought about a situation where hundreds of thousands of dollars will have to be refunded, if this conclusion of the Court is maintained. And the routine settlements by some large importers of merchandise in their business which were in the process of settlement, were interrupted and ended, since the taxpayers regarded this conclusion by the Court under such construction to mean that the Use Tax was not due. And the State is therefore being deprived of much additional revenue previously considered to be due by the purchasers of such material, and all the potential revenue which could and should have been collected in the future under the provisions of the law as construed by the Commissioner, and acquiesced in by the taxpayers themselves, will be brought to an end. And this result was certainly never contemplated by the Legislature, and cannot properly be held to be the intention of the Legislature, especially in view of the decision of the Supreme Court of the United States in the General Trading Company case, supra, in which this exact question has been settled in connection with the Iowa Use Tax Law, the pro- [fol. 89] visions of which are identical with the Use Tax Law of Mississippi.

I realize that there is a marked difference in the wording

of the statutes providing for exemption from the tax imposed on the activities of this appellant within the state under the Sales Tax Law, and the language of the statute granting exemption under the Use Tax Law. While I think the decision of the Court was correct in upholding the Sales Tax collected for the activity of the appellant in transmitting oil in a pipe line wholly within the state; and if the exemption from the Use Tax Law should have been made to depend upon the fact that the property involved was used or consumed in furtherance of interstate commerce, no great harm would result. And if the Court should hold that the fact that the oil when first received by this appellant was designed or intended for transportation beyond the borders of the state was in furtherance of interstate commerce, there could be some reasonable ground on which the exemption from the Use Tax Law could be based, if the Court should hold that the local handling of the oil preparatory to transmitting it beyond the borders of the state could be regarded "in furtherance of interstate commerce." But, even if the Court should hold that that was a proper basis for exempting the property from the Use Tax, merely because the property was used in placing the oil in position to be transmitted beyond the state, then such holding would do violence to the construction placed on the provisions in both the Sales and Use Tax Laws, and acquiesced in by the taxpayers as to the reduction in the rate of Sales Tax and the exemption from Use Tax, if the property was used or consumed "in furtherance of interstate commerce."

Indeed, railroads and many other carriers have acquiesced in the construction placed on said terms in the past by the Commissioner, that the privision "used or consumed in furtherance of interstate commerce" would only apply to [fol. 90] such materials as were actually consumed in the actual conduct of interstate movement of property or passengers.

Conclusion

I am always reluctant to suggest that this Court is in error in its decisions, and do so with the greatest deference, but the far-reaching effect of the decision with reference to the item of Use Tax involved in this cause, not only in the depriving of the State of its anticipated revenue, which the Use Tax Law is designed to cover in the ever expanding oil operations in Mississippi, but because of the large amount

of refunds that it will be necessary to make on taxes previously collected from persons bringing oil field equipment into the state, the taxes on which have been admitted to be due under a proper construction of the law, makes it imperative for me to call to the attention of this Court the harmful effect of this decision when based on a construction of the law entirely foreign to the accepted meaning thereof by all persons concerned, as well as being in direct conflict with the decision of the Iowa Court in construing a similar statute of Iowa, and in conflict with the Supreme Court of the United States on the exact question.

I therefore respectfully submit that the language used by this Court in its majority opinion as to the reason for holding that the Use Tax paid by this appellant was not due, should be withdrawn. But if the Court should be of the opinion that the property on which the Use Tax was paid was used "in furtherance of interstate commerce," even though the activity of the appellant within the state on which the Sales Tax was demanded and paid is not interstate commerce, then the loss of the small amount of the Use Tax involved in this case would not be harmful to the finances [fol. 91] of the State, whereas if the basis for holding the Use Tax not due in this case should be adhered to by this Court, then the anticipated revenue that the state should receive, and which the law was intended to authorize the State to receive, could not be collected on the vast amount of material which will be brought into the State in the future in the development of the oil production in Mississippi.

I therefore earnestly urge that the part of the majority opinion dealing with the Use Tax Law be reconsidered and that the decision of the Court on said question be reversed, or that the holding that the Use Tax was not due be placed on some other grounds which would be more reasonable under the law than that announced by the Court in its majority opinion.

Respectfully Submitted, (S.) J. H. Sumrall, Attorney for the Appellee.

Certificate

I, J. H. Sumrall, Attorney of Record for the Appellee in the foregoing cause, in anticipation of a favorable consideration by the Court of this Suggestion of Error, have this day mailed a true copy of this Suggestion of Error to Messrs.

Alexander, Alexander and Chill, of Jackson, Mississippi, Attorneys of Record for the Appellant.

(S.) J. H. Sumrall, Attorney for the Appellee.

[fol. 92]. [File endorsement omitted.]

IN THE SUPREME COURT OF MISSISSIPPI

[Title omitted]

SUGGESTION OF ERROR FOR APPELLANT, INTERSTATE OIL PIPE LINE COMPANY—Filed May 25, 1948

Comes now Interstate Oil Pipe Line Company, appellant herein, and files this suggestion of error and respectfully suggests that the Court erred in its decision heretofore rendered in this cause. It appears that this error may have arisen from a confusion between the question of the power of the State to tax interstate commerce or incidents thereof and the question of whether or not the activities of the appellant in the instant case are in fact part of interstate commerce. If the State has the power to levy a tax on the gross receipts from interstate commerce, and has exercised that power, the question of whether the activities of this appellant are interstate or intrastate commerce becomes unimportant. They are taxable in either event. But if the States does not have or has not exercised the power to levy such a tax, the only question for decision is whether or not the activities of the appellant constitute interstate commerce. For grounds of such error, appellant assigns the following:

1. The Court does not make it clear whether or not it is holding that transportation of oil by pipe line between points in the State may be subject to the Sales Tax (Para. 10109, Chap. 3, Vol. 7, Mississippi Code of 1942) even though such transportation may constitute *interstate commerce*.

(a) If the Court holds interstate commerce taxable, it must (1) ignore the exemption clause in the Mississippi Act, and (2) go directly contrary to the opinions of the United States Supreme Court which have always held, including those cases decided since the innovation

of the "share the burden theory," that privilege taxes levied on the basis of gross receipts are invalid as applied to gross receipts from interstate commerce.

[fol. 93] (b) If the Court holds interstate commerce is not taxable under the Mississippi Act, then that portion of the opinion of the Court beginning on page 14 thereof and continuing to page 20 enters in no way into the decision reached by the Court in this case. In the latter event the decision of the Court must turn on the question of whether the operations of appellant on which the tax has been levied constitute interstate or intrastate commerce.

2. The Court erred in holding on page 10 of its opinion that "this pipe line company was an intrastate carrier" insofar as its activities are involved in this case.

I

Is Interstate Commerce Subject to the Tax Imposed by Section 10109, Mississippi Code of 1942?

On page 9 of its opinion the Court says that on "transported to destinations outside the State, either by interstate trunk pipe lines, on a continuous journey, or likewise by railroad from local shipping points within the State" constitutes "that character of commerce 'which the State of Mississippi is prohibited from taxing under the Constitution of the United States of America.'" This statement would indicate that the Court accepts the exemption clause in the tax statute which is quoted in part in the above portion of its opinion, and that the tax does not apply to gross receipts from interstate transportation. It is suggested that this is the only correct interpretation of Paragraph 10109, Chapter 3, Volume 7, Mississippi Code of 1942. The *right* or *power* of the State to tax is not in issue as the legislature has seen fit to exclude interstate commerce from the operation of the statute.

The Court goes on, however, in its opinion, pages 14 to 20, to consider the State's *power* to tax interstate commerce under the "share the burden" theory. This argument could be reconciled with the statutory exemption if it could be established that even though the transportation of oil is interstate commerce, it is not commerce "which the State of Mississippi is prohibited from taxing under the Constitu-

tion of the United States of America." But if this latter premise were established, then a privilege tax could be levied on the gross receipts from all transportation by pipe line, by railroad, or otherwise, regardless of whether it were part of an interstate movement. If the State had the [fol. 94] power and right to levy a privilege tax measured by the gross receipts from interstate commerce, there would be no reason to stop with the taxation of the particular movements involved in this suit. The exemption on which appellant is relying in this case would be meaningless and of no effect. But the State Tax Commission has never based its levy on such a contention and has not made such a contention in this suit. Furthermore, such a contention is inconsistent with the language of this Court on page 9 of the opinion which was quoted above. In light of this inconsistency, the appellant does not believe the Court intended to base any part of its decision in this case on the theory of the case of *McGoldrick* vs. *Berwind-White Coal Mining Co.*, 309 U. S. 33, 84 L. Ed. 565, relied on by the Mississippi Supreme Court in the case of *Stone* vs. *Memphis Natural Gas Co.*, 29 So. (2) 268, that interstate commerce must bear its "just share of state tax burdens." But since the Court has discussed this theory with approval and at some length in its opinion, the appellant feels that the opinion should include a statement as to the applicability of this material to this case.

In event the Court is basing its decision in any part on the power of the State to levy a privilege tax based on gross receipts from interstate commerce, it should be pointed out that the State has no such power. The appellant in its original brief in this cause under Part I of its argument pointed out the fact that the United States Supreme Court has never under the "share the burden" or any other theory sustained a state tax levied directly on gross receipts derived from interstate commerce. This is true whether it be called a "privilege" tax, a "sales" tax, or some other kind of a tax, so long as it is in fact a *direct* tax on interstate transportation. Indeed, the case of *McGoldrick* vs. *Berwind-White Coal Mining Co.*, supra, which the Court cites in its opinion limits the effect of the "share the burden" theory therein expounded with the following language:

> "Certain types of tax may, if permitted at all, so readily be made the instrument of impeding or destroy-

ing interstate commerce as plainly to call for their condemnation as forbidden regulations. Such are the taxes already noted which are aimed at or discriminate against the commerce or impose a levy for the *privilege of doing it* or tax *interstate transportation* or communication or their *gross earnings*, or levy an exaction on merchandise in the course of its interstate journey." (Italics ours.)

The true nature of the tax under consideration and its effect upon interstate commerce is to be determined by its economic effect rather than by its verbal characterization. As was said in the case of *Wagner* vs. *Covington*, 251 U. S. 95, 64 L. Ed. 157:

[fol. 95] "and it hardly is necessary to repeat that when this court is called upon to test a state tax by the provisions of the Constitution of the United States, our decision must depend not upon the form of the taxing scheme, or any characterization of it adopted by the courts of the state, but rather upon the practical operation and effect of the tax as applied and enforced. The state court could not render valid, by misdescribing it, a tax law which in substance and effect was repugnant to the Federal Constitution; neither can it render unconstitutional a tax that, in its actual effect, violates no constitutional provision by inaccurately defining it. *St. Louis Southwestern R. Co.* vs. *Arkansas*, 235 U. S. 350, 362, 59 L. Ed. 265, 271, 35 Sup. Ct. Rep. 99."

The recently decided case of *Richfield Oil Corp.* vs. *State Board*, 329 U. S. 69, 91 L. Ed. 80, makes this pertinent observation:

"The tax is measured by the gross receipts of retail sales and is levied on retailers 'for the privilege of selling tangible personal property at retail.' Cal. Stat. 1935, p. 1,253. The retailers are authorized to collect the tax from the consumers. Cal. Stat. 1933, p. 2,602. And a sale is 'any transfer of title or possession . . . in any manner or by any means whatsoever of tangible personal property, for a consideration.' Cal. Stat. 1935, p. 1,256. The California Supreme Court held that the tax is an excise tax for the privilege of conducting a retail business measured by the gross

receipts from sales; that it is not laid upon the consumer and does not become a tax on the sale or because of the sale. (27 Cal. (2) 152, 163 P. (2) 2.

"That construction, being a matter of state law, is binding on us. But it is not determinative of the question whether the tax deprives the taxpayer of a federal right. That issue turns not on the characterization which the state has given the tax, but on its operation and effect. See *St. Louis S.W.R. Co.* vs. *Arkansas*, 235 U. S. 350, 362, 59 L. Ed. 265, 271, 35 S. Ct. 99; *Kansas City, Ft. S. & M.R. Co.* vs. *Botkin*, 240 U. S. 227, 231, 60 L. Ed. 617, 618, 36 S. Ct. 261."

The U. S. Supreme Court specifically proclaimed the invalidity of a State tax upon gross receipts from interstate commerce as early as 1887 in *Philadelphia & S. Mail S. S. Co.* vs. *Pennsylvania*, 122 U. S. 326, 30 L. Ed. 1,200; reiterated the doctrine in 1888 in *Ratterman* vs. *Western Union Telegraph Co.*, 127 U. S. 411, 32 L. Ed. 229; again in 1908 in *Galveston, H. & S.A.R. Co.* vs. *Texas*, 210 U. S. 217, 52 L. Ed. 1,031; in 1912 in *Meyer* vs. *Wells Fargo*, 223 U. S. 298, 56 L. Ed. 445; in 1917 in *Western Oil Refining Co.* vs. *Lipscomb*, 244, U. S. 346, 61 L. Ed. 1,181; in 1930 in *New Jersey Bell Telephone Co.* vs. *State Board of Taxes and Assessments*, 280 U. S. 338, 74 L. Ed. 463; in 1936 in *Fisher's Blend Station* vs. *Tax Commission*, 297 U. S. 650, 80 L. Ed. 956; in 1937 in *Puget Sound Stevedoring Co.* vs. *Tax Commission*, 302 U. S. 90, 82 L. Ed. 68; and in 1946 in *Freeman* vs. *Hewit*, 329 U. S. 249, 91 L. Ed. 265. Then in 1947 in *Joseph* vs. *Carter & Weekes Stevedoring Co.*, 330 U. S. 422, 91 L. Ed. 993, the U. S. Supreme Court decided a case that, as far as [fol. 96] the question of the power of the State to tax interstate commerce is concerned, was very similar to the instant case. In the *Carter & Weekes* case, the question was the power of the City of New York to levy on the business of loading and unloading in New York harbor vessels engaged in interstate commerce a tax providing as follows:

"For the privilege of carying on or exercising for gain or profit within the city any trade, business, profession, vocation, or commercial activity . . . every person shall pay an excise tax which shall be equal to one-tenth of one per centum upon all receipts received in and/or allocable to the city from such profession,

vocation, trade, business or commercial activity exercised or carried on by him during the calendar year . . . ."

It will be noted that the tax involved in that case was a non-discriminatory local privilege license imposed for the carrying on of any trade, business, commercial activity, etc., and that the rate was only one-twentieth of the rate imposed by the statute at issue in this case. The Supreme Court in holding the tax invalid said in part, page 427:

". . . the words themselves of the Commerce Clause forbid undue interferences by the states with interstate commerce and that *this rule applies in full force to an unapportioned tax on the gross proceeds from interstate business*, where the taxes were not in lieu of ad valorem taxes on property." (Italics ours.)

That is the U. S. Supreme Court's latest word on the power of a State or its political subdivisions to levy a *privilege* tax *measured by gross receipts* from interstate commerce, the very question under discussion in the opinion in the instant case.

The Mississippi Privilege Tax Code (Title 38 of Mississippi Code 1942, Annotated) contains privileges taxes on all types of businesses and occupations, including, in Paragraph 9606, pipe line companies. This paragraph reads as follows:

"Upon each person engaging or continuing in this state in the business of operating a pipe line or transporting in or through this state oil, or natural or artificial gas through pipes or conduits, a tax as follows:

On each mile of pipe having a diameter of 20 inches or more	$75.00
On each mile of pipe having a diameter of 15 inches and less than 20 inches	$52.50
On each mile of pipe having a diameter of 12 inches and less than 15 inches	$37.50
On each mile of pipe having a diameter of less than 12 inches	$15.00

"The term 'pipe line' as used in this section shall include only trunk lines, and shall not apply to those pipe lines used solely for distributing gas or oil in or

near cities, towns and villages, (known as service lines), to the ultimate consumer. And this section shall not apply to those persons, firms, or corporations mining or producing gas or oil on which a privilege tax measured by gross production is imposed and paid in this State."

The incidence of this tax is almost identical to the incidence of the Sales Tax as construed by the Court in its opinion herein. They are both taxes on the business of operating a pipe line. But in Paragraph 9606, the amount [fol. 97] of the tax is measured simply by the miles of pipe line in the State regardless of the type of use or the amount of use of those lines. The tax would be the same if the company did one dollar's worth of interstate business or $100,000 worth of such business, or even if it did no interstate business. Even so, this privilege tax which had no exemption clause for interstate commerce and which was not based on gross receipts was held invalid by the United States Supreme Court when applied to interstate commerce, *State Tax Commission* vs. *Interstate Natural Gas Company, Inc.*, 284 U. S. 41, 76 L. Ed. 156. Surely then, interstate commerce cannot be subjected to a privilege tax based on gross receipts, a tax which if applied to that commerce, varies directly with its volume and the proceeds derived therefrom.

As stated by the Court in its opinion (page 15), the cases cited in the opinion herein are not in point on the question of the power of the State to levy a privilege tax measured by gross receipts, because they did not involve that type of tax. *Stone* vs. *Memphis Natural Gas Co.*, supra, which the U. S. Supreme Court now has under consideration on certiorari, involves the question of the power of the State to levy a franchise tax based on capital, surplus and undivided profits allocated to Mississippi in the ratio of property owned and business done in the State. This type of tax is levied for the privilege of being in the State and not on the privilege of transacting interstate business. It does not depend on business being done. It is, therefore, less direct in its effect on interstate commerce than is the tax in the instant case. *McGoldrick* vs. *Berwind-White Coal Mining Co.*, supra, involved the question of the power to levy a sales tax based on sales price on transfer of ownership of property at the conclusion of an interstate journey. *Stone* vs. *Interstate Natural Gas Co.*, 308 U. S. 522, 84 L. Ed. 442, was another

Mississippi franchise tax case. *Stone* vs. *General Contract Purchase Corp.*, 7 So. (2) 806, 193 Miss. 301, and *Stone* vs. *General Electric Contracts Corp.*, 7 So. (2) 811, 193 Miss. 317, involved a privilege tax levied on finance companies based on the value of securities purchased by them in the State. *State of Wisconsin* vs. *J. C. Penney*, 311 U. S. 435, 85 L. Ed. 267, involved a tax "for the privilege of declaring and receiving dividends" based on 2½% of the amount of such dividends. *Coverdale* vs. *Arkansas-Louisiana Pipe Line Co.*, 303 U. S. 604, involved a privilege tax on the development of power to operate machinery based on a rate of $1 per annum per horse power.

Dunston vs. City of Norfolk, 15 S. E. (2) 86, was another case involving a privilege tax on the sale of products which had moved in interstate commerce. Cases such as this latter and the *Berwind-White* case may be clearly distinguished from the instant case where we have a tax not on the *proceeds from the transfer of ownership* of goods which have been moved in interstate commerce as in those cases, but a tax on the actual *proceeds received for the movement* of goods, a tax on the transportation service furnished.

[fol. 98] Thus it is evident that there is not now and never has been a trend in the decisions of the Supreme Court of the United States toward allowing the States to levy a privilege tax based on gross receipts from interstate transportation. An unbroken line of authority right down to the last term of Court has held such taxes invalid. The only question for decision in this case then is whether or not the gross receipts on which the tax herein was assessed were from interstate commerce.

II

Are the Appellant's Activities Intrastate Commerce?

The Court apparently bases its decision that "this pipe line company was an intrastate carrier" insofar as its activities here involved are concerned on the following arguments, the error of each of which shall be shown in turn:

> (a) "If the exemption was intended to apply under the facts of the instant case, then the levy of the tax on the privilege of operating a pipe line for the transportation of oil from one point to another in the State could have served no useful purpose . . ." (Opinion, page 9).

(b) The oil transported by pipe line is ultimately shipped out of the State in interstate commerce, but the interstate commerce does not commence until the railroad movement starts.

(c) The pipe line company was hired only to transport the oil from one point in the State to another and did not participate in the tariff paid for the actual shipment out of the State.

(d) The pipe line company does not transport the oil out of the State.

In the first argument set out above the Court has judicially determined that there are no shipments of oil from one point in Mississippi to another where the oil is not ultimately to be transported out of the State. The Court, therefore, maintains the legislature would not have even provided a tax on pipe line transportation if it had not intended to tax the type of shipments here. This premise is that the Legislature would not have levied the tax unless it had intended to collect a considerable amount of revenue and that since all the oil produced in the State was shipped out, it must have intended to tax interstate transportation although such purpose is expressly negatived in the exemption clause. This argument assumes that the Legislature thought that the oil industry in Mississippi would always remain as [fol. 99] it was when this provision of the law was enacted and that no crude oil would ever be stored or processed in this State. As a matter of fact, there are now a few small refineries operating in the State, some of which are served by local pipe lines. The intent of the legislature was clearly to tax "every person engaging . . . in the business of operating a pipe line for transporting from one point to another in this State oil . . ." and such tax was to be measured by "the gross income of the business," except for gross income "derived from business conducted in commerce . . . which the State of Mississippi is prohibited from taxing under the Constitution of the United States of America." The legislature was levying the tax only on the business of "transporting from one point to another in this State," yet they realized that part or all of the gross receipts from business between points in the State might be derived from interstate commerce and hence would not be subject to State taxation. In any event, the

intent of the legislature is indicative only of the scope of the statute and does not help in any way to determine whether or not the activities of this appellant are interstate commerce. The stipulated facts of this case when measured by the yardstick of judicial authority show those activities to be entirely interstate in nature.

The Court expresses the idea of the second argument at the top of page 10 of the opinion and goes fully into the argument beginning at the bottom of page 11 of said opinion. The pipe line movement in this case the Court contends is the type of movement referred to in American Jurisprudence when it states that:

> ". . . a movement merely in preparation for export . . . a mere transfer of the property to a depot or other place within a state from which the transportation or journey to another state is to begin *at a convenient time*, is not a part of that transportation." (Italics ours.)

We agree with the principle of law and with the case cited in support thereof, *Coe* vs. *Errol*, 116 U. S. 517, but feel the Court erred in applying the principle to the instant case. The appellant respectfully submits that in the case of pipe line transportation the "depot or other place" from which the "journey to another state is to begin" is the point at which the oil is received into the pipe line's custody, the connecting valves at the lease tanks in the producing fields where the pipe line transportation begins. The Court has failed to recognize that the pipe line company is a *common carrier* just as much so as is the railroad and is similarly subject to the control of the Interstate Commerce Commission. The above principle of law did not contemplate commitment of the goods to a *common carrier* for transporta-[fol. 106] tion in *continuous movement* out of the State such as we have in this case. Indeed, one sentence quoted by the Court (Opinion, page 12) from the *Coe* vs. *Errol* case is as follows:

> "Until actually launched on its way to another State or *committed to a common carrier* for transportation to such State, its destination is not fixed and certain."

The destination is just as "fixed and certain" and the shipper is no more likely to change his mind when the pipe

line is carrying the oil than when the railroad is carrying it. The fact of possibility of diversion in transit in either instance does not destroy the interstate character of the shipment. A shipper always has the power to order a carrier to stop a particular shipment as soon as the facilities of the carrier permit and may either terminate the shipment at such point or divert it to another destination. However, the Court is in error in stating that diversion to an intrastate destination could be made while the oil is in the appellant's custody without violating the shipper's agreement with the pipe line company. The tariff filed with the Interstate Commerce Commission under which the shipments here involved were made and which was included as an exhibit with the agreed statement of facts herein, contains the following provision:

> "This Company will receive crude petroleum, as herein defined, from lease tankage within the area of its gathering system, for transportation to destination named herein, *for interstate transportation beyond,* under the terms and conditions of the following rules and regulations." (Italics ours.)

Thus this tariff would be breached by a diversion to an intrastate destination. A local movement destined for ultimate delivery within the State could not be handled under these I. C. C. tariffs, but would have to be the subject of a special contract negotiated between the shipper and pipe line. None of the shipments involved in this suit were of that nature. As demonstrated in Part II of the argument in our original brief, the movement by the pipe line in this case cannot be separated from the movement by the railroad. They are each portions of the continuous movement by the shipper from the producing fields in Mississippi to points outside Mississippi. Suppose there had been railroad spur lines running through Eucutta or Heidelberg fields at the time of their discovery and that fifteen miles away these railroad spurs intersected an interstate oil pipe line. Suppose then the owner of the oil made arrangements to load his oil on the railroad and have it operate a shuttle service to the pipe line where the oil would be transferred to tanks and be fed into the pipe line for shipment out of the [fol. 101] State. Would the Court hold that the railroad movement was an intrastate movement prior to and only

in preparation for the interstate shipment by the pipe line? This situaiton would as does the instant case have all the elements necessary to make it a part of the interstate shipment. There is no basis for distinction between shipment first by rail and then by pipe line and shipment first by pipe line and then by rail. There is no magic in railroad transportation that makes it interstate commerce and that makes pipe line transportation something less. Suppose the oil instead of being transported a few miles by pipe line and then being transferred to a railroad had been transported many miles by pipe line and then loaded aboard barges at Natchez for shipment to Baton Rouge. Or suppose the oil had been carried by pipe line to Gulfport and had there been loaded aboard tankers for shipment to New Jersey. Would the Court have still held that the pipe line movement was only in preparation for and not part of the interstate movement? Such a decision would be directly contrary to the case of *Railroad Commission* vs. *Texas & Pacific Ry. Co.*, 229 U. S. 336, 57 L. Ed. 1,215, where the U. S. Supreme Court held a railroad transporting lumber from one point in Louisiana to another was engaged in interstate commerce since the lumber was transferred from the railroad to ships as sufficient cargo was accumulated, and thence shipped out of the State. The same rule has been applied to pipe lines in *Clark* vs. *Atlantic Pipe Line Company*, 134 S.W.(2) 322, where the pipe line operations were from points in Texas to the Texas Gulf Coast. There the oil was transferred to tankers for shipment out of the State. Many cases of a similar tenor may be found in our original brief. Or does the Court seek to show a distinction on the basis of the distance the oil is moved? Is a movement by the pipe line of 5 miles merely preparatory to the interstate shipment, but a movement of 100 miles part of the interstate shipment? If so, a line must be drawn some place. Where will the Court draw this line? At 6 miles, at 7 miles, or at 51 miles? Thus, on examination the error of testing a shipment by the length of the movement becomes readily apparent, and we realize that we must return to the test established by the Courts, the essential character of the shipment. We established, pages 26-35 inclusive of our original brief, that where oil or other freight is committed to a common carrier with the intent of the shipper that it shall be shipped out of the State, the interstate transportation of

the freight has in fact commenced. The undisputed facts in the instant case show commitment to a common carrier with intent to transport out of the State and that the oil is in fact so transported.

[fol. 102] A third factor which seems to influence the Court in its decision that the appellant's activities are intrastate commerce is the fact that the railroad and pipe line do not move the oil under the same contract and that they make separate charges to the shipper for their services. On page 2 of the opinion the Court states that the appellant

> "received no part of the charges collected by the railroad company for transporting the oil across the state line to its destinations. In fact, it had no contractual relation with the railroad company in connection with the latter's said interstate transportation of such oil."

On page 11 of the opinion the Court says the pipe line company

> "was not employed or hired to transport oil . . . outside the state, but only to transport the same to the railroad and then pump it into the railroad tank cars as a local activity."

Again on page 13 the Court says:

> ". . . the pipe line company was to receive no part of the charges to accrue after the oil was loaded into railroad tank cars for its final destination."

The tax, the Court says at page 14,

> "is not measured by a per cent of the entire gross income received from the transportation of the oil from the tanks on the producing leases to its out of state destination,"

since there are separate tariffs. But the Court itself shows the mistake of relying on these factors in determining whether or not a movement is interstate commerce when it says on page 11 of the opinion,

> "In other words, neither the form of contract nor method of billing is controlling on the question of whether the pipe line company was employed to do more than render a local service for the owner of the oil. . . ."

The truth of this statement is undeniable. It is reflected in all the cases in which the question has ever been raised. Many of these cases were cited in our original brief where that subject was dealt with from pages 40 to 46 inclusive. Why then has the Court laid such stress on the fact of separate charges and lack of contractual relationship? If the appellant had thought this point controlling, joint tariffs could have been arranged with the railroad, covering the shipment from lease tanks to final destination. It is not common practice for pipe lines and railroads to operate under joint tariffs because of practical difficulties, both both types of common carrier are under the jurisdiction of the Interstate Commerce Commission and operate under tariffs filed with that Federal commission. They could operate [fol. 103] under joint tariffs if they so desired. If a joint tariff had been arranged in the instant case, would the Court have held that the appellant's activities were interstate? The characteristics of separation on which the Court lays such stress would have disappeared, but the essential character of those activities would not have been changed. The essential character would remain, as it now is, interstate commerce and the same decision should be reached although the charges are separate.

A fourth factor may have influenced the Court in its decision that appellant's activities are intrastate. On page 10 of the opinion it states:

> "It (the appellant) transported no oil across the State line in the operation of such local pipe lines, that is to say, the essential and controlling feature of its business from which the tax in question was collected was the transportation of oil from one point to another in intrasfate commerce."

We are in agreement with this statement except for the last two words. The balance of the statement is no authority for this legal conclusion. We cannot think that the Court attached any weight to the fact that appellant did not itself transport the oil across the state line in reaching its conclusion. The reporter system is full of cases in which goods were transported from one point to another within a State and yet were held to be in interstate commerce. A few of these authorities, including *Joseph vs. Carter & Weekes Stevedoring Co., supra*, one of the latest decisions by the

United States Supreme Court on this specific point, were cited in our original brief, pages 37 to 40 inclusive. In the *Carter & Weekes* case there was no question but that all the activities took place entirely in New York City. Furthermore, the stevedoring company was separately paid for these activities and clearly did not participate in the steamship company's freight charge for its transportation. We are unable to find any valid distinction between the loading of ships and the loading of railway tank cars insofar as the question of the connection of this loading with the subsequent out of state shipment is concerned. The facts of the instant case, of course, are stronger than those of the *Carter & Weekes* case in that the appellant was a common carrier and that there was a transportation by the appellant in addition to the loading.

One other point made by the Court requires comment. The Court at page 20 of the opinion apparently dismisses many of the authorities cited in our original brief with the comment:

> "We are of the opinion that the case of *Carson Petroleum Co.* vs. *Vial* . . . and other similar cases . . . some of which are relied on by the appellant, are to be [fol. 104] distinguished from the instant case in that they involve only the question of whether or not a property tax—for ad valorem purposes—could be imposed upon a commodity which is temporarily interrupted in transit for a change in the mode of transportation and where the same does not remain in the taxing state long enough to acquire a situs therein for ad valorem taxation purposes."

Evidently the Court has confused the authorities cited on the question of the *State's power to tax interstate commerce* or incidents thereof and those cited on the question of *what constitutes interstate commerce*. The principle that the State cannot levy an ad valorem tax on property moving in interstate commerce is well settled. But we did not cite these cases to prove that the State cannot levy a gross receipts tax on the proceeds of interstate commerce. We recognize that one is not authority for the other. To prove our argument on the State's lack of power to tax, we used cases involving privilege taxes measured by gross receipts, the identical tax which is involved in this case. But we did

use the property tax cases to establish when goods are in interstate commerce. They are authority for the question of when interstate commerce has commenced, and the fact that interstate commerce is not broken by transfer from one carrier to another or from one mode of transportation to another or by temporary stoppage in transit to effectuate such transfer. They are authority for the fact that movement entirely within one state on a local bill of lading can be part of an interstate movement. We have used property tax cases *along with* privilege tax cases to establish those points. The Court itself has similarly used property cases in its opinion. The case of *Coe* vs. *Errol, supra,* on which the Court relies, and the quotation from 51 Am. Jur. Section 205, beginning on page 11 of the opinion herein, are concerned with when property is being carried in interstate commerce so as to be exempt from ad valorem taxation. Such reliance on property tax cases is natural since they form the great bulk of judicial authority on the definition of interstate commerce, for which they are valid authority.

Conclusion

We do not believe the Court has based its opinion on the validity of the Sales Tax, paragraph 10,109, Chap. 3, Vol. 7, Mississippi Code of 1942, as applied to the activities of the appellant on the power or right of the State to tax interstate commerce, but since it has considered this question at length in its opinion, we feel that its position in this regard should be made clear. If the Court has based its opinion to any extent on the "share the burden" doctrine as set out in [fol. 105] *Stone* vs. *Memphis Natural Gas Co., supra,* we respectfully suggest that the Court withhold its ruling on this Suggestion of Error until such time as the United States Supreme Court has handed down its opinion in that case.

We believe that the Court's opinion rests on its finding that the activities of this appellant constitute intrastate commerce, i.e. are a purely "local activity." But the grounds for this legal conclusion are not apparent. The intent of the legislature is important in determining the scope of the statute, but not in determining whether this appellant is an interstate or intrastate carrier. We cannot believe the Court based its conclusion on the belief that interstate transportation had not started, for this movement had all the elements of interstate commerce ever required by any of the authorities which have come to our attention. There was

commitment to a common carrier with intent to ship the oil out of the state. There was movement by that common carrier, the appellant, to the end of its line, where the oil was transferred to another carrier for a continuation of the movement to its destination out of the State. We do not believe the Court could have based a finding that the interstate movement had not commenced on the fact that only a certain number of miles were traversed, or that a pipe line and not a railroad was the originating carrier. Nor do we believe the Court found interstate commerce had not commenced because the appellant had no contractual relationship with the second carrier and was paid separately for its services. The Court itself has stated that such factors are not controlling. The fact that appellant's activity took place entirely within the State must also be dismissed as grounds for the Court's opinion.

The cases of *Daniel Ball* vs. *U. S.*, 77 U. S. 557, 19 L. Ed. 999. (1871), *Railroad Commission* vs. *Texas & Pacific Ry. Co., supra* (1913), *Puget Sound Stevedoring Co.* vs. *Tax Commission, supra* (1937), *Clark* vs. *Atlantic Pipe Line Company, supra* (1939), *Joseph* vs. *Carter & Weekes Stevedoring Co., supra* (1947), and other cases cited in appellant's original brief were all cases in which there was transportation only from one point to another in the same state, in which the mode of transportation was changed at the end of that "within State" movement, in which the movement within the State was separately charged and paid for, in which if there had been no intent to ship the goods out of the State and had been no subsequent shipment of the goods, the shipment would have been a purely "local activity." But because there was intent that the initial movement should be followed by a subsequent movement out of the State and because this subsequent movement in fact ensued without a break in the [fol. 106] continuity, these movements were all held to be in interstate commerce. The facts in the instant case are stronger than the facts in several of the cases cited. The Court has "conceded" in its opinion at page 14 that

> "there is no appreciable interruption at the railroad shipping point in the continuity of the transportation of the oil from the tanks on the producing oil leases to its out of state destinations . . ."

On what factors then did the Court base the opinion that appellant's activities are intrastate?

The stipulated facts of this case clearly place appellant's transportation of oil within the definition of interstate commerce. The tax, therefore, is not levied on the gross proceeds of a "local activity" but on the gross proceeds from a portion of an interstate movement of oil. We respectfully suggest that such a tax cannot be sustained either under the language of the Mississippi Statute or under the Commerce Clause of the Constitution of the United States as construed by the United States Supreme Court.

In the original Assignment of Errors filed in this case with our original brief, we set out three errors of the lower court as follows:

> "(1). That the gross income of appellant, Interstate Oil Pipe Line Company upon which sales taxes were paid and for refund of which this suit was brought, was excepted from the gross income used in determining the measure of the tax imposed by Section 10109 of the Mississippi Code of 1942, by reason of the fact that said gross income 'was derived from business conducted in commerce between this State and other States of the United States which the State of Mississippi is prohibited from taxing under the Constitution of the United States of America.'
>
> "(2) That the use, storage or consumption of the tangible personal property by appellant within this State upon which use or compensating taxes have been paid and for refund of which this suit was brought was exempt from tax by the provisions of Section 10149 of the Mississippi Code of 1942 by reason of the fact that said personal property was 'used or consumed in the furtherance of interstate transportation or interstate commerce.'
>
> "(3) That if the General Sales Tax Law and the Compensating or Use Tax Law, which are incorporated in Title 40, Chapter 3, Volume 7, of the 1942 Code of Mississippi, as amended by Chapter 262 of the General Laws of Mississippi for 1946, House Bill No. 311, are applicable to Appellant's activities as set out in this suit, then said laws are void and of no effect by reason of the fact that they are in conflict with Article I, Section 8, Clause 3, of the Constitution of the United States, known as the Commerce Clause."

In order that there may be no misunderstanding and no question as to the scope and meaning of the decision of the Court [fol. 107] in this case, we respectfully suggest that the final opinion of the Court in this case contain specific rulings on each of those assigned errors.

Respectfully submitted, J. L. Seger, P. H. Hunter, F. R. Clark, Jr., James A. Alexander, Walter D. Davis, Attorneys for Appellant. Jas. A. Alexander, of Counsel.

[fol. 108] IN THE SUPREME COURT OF MISSISSIPPI

In Banc: 16308

No. 36,672

INTERSTATE OIL PIPE LINE COMPANY

vs.

A. H. STONE, Chairman State Tax Commission

OPINION ON SUGGESTIONS OF ERROR—Filed June 14, 1948

ROBERDS, J.

Each party to this appeal has filed a Suggestion of Error.

Appellant contends we were in error in affirming the lower court in its disallowance to appellant of a refund of $20,296.36 collected by the Chairman of the State Tax Commission for appellant's privilege in operating pipe lines in Mississippi through which it transported oil from one point to another in this State. Sections 10105 and 10109, Code 1942. We have reexamined the questions, but find no reasons impelling a change in, or reversal of, that opinion.

Appellee suggests that we erred in allowing to appellant a refund of Use Taxes amounting to $5,030.27. That holding was based, first, on the ground that the property operated by appellant in transporting oil was used "* * * in the furtherance of interstate transportation, or interstate commerce * * *"; and, second, on the further ground that such property was "* * * not procurable in the ordinary channels of trade in the State of Mississippi," both of which exceptions are set out in Section 10149, Code 1942. The facts underlying the second ground were not fully devel-

oped in the record, but we thought enough appeared to justify our holding in the absence of citation of any authority to the contrary. However, the Suggestion of Error has [fol. 109] called to our attention the cases of Peoples Gas & Electric Company v. State Tax Commission of Iowa, 28 N. W. (2d) 799, and General Trading Company v. State Tax Commission of Iowa, 322 U. S. 335, 88 L. Ed. 1309, apparently holding otherwise. A decision on this point was not necessary to the result reached by us; it was sufficient that the property was being used in furtherance of interstate transportation or commerce. We, therefore, withdraw all that was said in the original opinion in Paragraphs Eleven, Twelve and Thirteen thereof, and we let non-liability for the Use Tax rest solely on the stated ground that the property was being used in furtherance of interstate transportation or interstate commerce.

Both suggestions of error are overruled.

[File endorsement omitted.]

[fol. 110] IN THE SUPREME COURT OF MISSISSIPPI

[Title omitted]

JUDGMENT ON SUGGESTIONS OF ERROR—June 14, 1948

This cause this day came on to be heard on the suggestions of error filed herein and this court having sufficiently examined and considered the same and being of the opinion that both of said suggestions of error should be overruled doth order and adjudge that said suggestions of error be and they are both hereby overruled, but this court does not withdraw all that was said in the original opinion in Paragraphs Eleven, Twelve and thirteen thereof and it is so ordered.

[fol. 111] [File endorsement omitted]

IN THE SUPREME COURT OF MISSISSIPPI

[Title omitted]

PETITION FOR APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed August 11, 1948

To the Chief Justice of the Supreme Court of the State of Mississippi:

Your petitioner, Interstate Oil Pipe Line Company, a Delaware corporation, respectfully shows:

1. Petitioner is the appellant in the above entitled cause.

2. Petitioner filed a complaint in the Circuit Court of the First District of Hinds County, Mississippi, on the 4th day of April, 1947, to recover from A. H. Stone, Chairman State Tax Commission, sales taxes in the amount of $20,296.36 and use taxes in the amount of $5,030.27 for the years 1944 and 1945 and for the period from January 1, 1946 to June 30, 1946, which petitioner had paid under protest, contending that said taxes were not due by reason of the fact that they were imposed on its business of transporting oil by pipe line in interstate commerce which is specifically exempt by the provisions of the Mississippi Sales and Use Tax Law and which the State of Mississippi is prohibited from taxing by the provisions of Article I, Section 8, Clause 3, of the Constitution of the United States and that said statute as applied was repugnant to the Constitution [fol. 112] of the United States and void: Judgment was rendered by said Court in said cause in favor of appellee, denying recovery of said taxes.

3. Petitioner took an appeal from said judgment of the Circuit Court of the First District of Hinds County, Mississippi, to the Supreme Court of the State of Mississippi, and that Court, on the 26th day of April, 1948, entered its opinion and judgment affirming said judgment insofar as it disallowed a refund of sales taxes in the amount of $20,296.36 to petitioner, but reversing the same insofar as it disallowed a refund of use taxes in the amount of $5,030.27 and allowing said amount to petitioner. Thereafter both petitioner and appellee filed in the Supreme Court of the State of Mississippi petitions for rehearing, which under

the practice in said Court are denominated as Suggestions of Error, and by opinion and decision of the Supreme Court of Mississippi entered June 14, 1948, certain paragraphs of the opinion of April 26, 1948 were withdrawn and the Suggestions of Error were overruled. The Supreme Court of Mississippi is the highest court of the State of Mississippi in which a decision in the suit could be had, and its judgment of June 14, 1948 aforesaid is a final judgment.

4. In said cause there is drawn in question the validity of a statute of the State of Mississippi, to-wit, the General Sales Tax Law incorporated in Sections 10,105, 10,109, Title 40, Chapter 3, Volume 7, of the 1942 Code of Mississippi, as amended, on the ground that as applied it is repugnant to Article I, Section 8, Clause 3 of the Constitution of the United States, known as the Commerce Clause, and the decision is in favor of its validity.

5. The errors upon which petitioner claims to be entitled to an appeal are those above indicated, and more fully set [fol. 113] out in the Assignment of Errors filed herewith. A jurisdictional statement is also filed herewith.

Wherefore, petitioner prays for the allowance of an appeal from said Supreme Court of the State of Mississippi, to the Supreme Court of the United States, in order that the decision of the Supreme Court of the State of Mississippi may be examined and reversed, and also prays that a transcript of the record, proceedings and papers in this case, duly authenticated by the Clerk of the Supreme Court of the State of Mississippi, may be sent to the Supreme Court of the United States, as provided by law, and that an order be made concerning the security to be required for costs.

Dated August 11, 1948.

Villard Martin, Joseph L. Seger, Phelan H. Hunter, Frank R. Clark, Jr., Garrett Logan, Attorneys for Petitioner and Proposed Appellant.

[fols. 114-116] [File endorsement omitted]

IN THE SUPREME COURT OF MISSISSIPPI

[Title omitted]

ORDER ALLOWING APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed August 11, 1948

The petition of Interstate Oil Pipe Line Company for an appeal in the above cause to the Supreme Court of the United States from the Supreme Court of Mississippi and the assignments of errors and statement as to jurisdiction filed therewith and the record of said cause having been considered, and it appearing that Suggestions of Error filed herein are equivalent to petitions for re-hearing in other jurisdictions, and that final judgment in this cause was rendered June 14, 1948, it is

Ordered, that an appeal herein be and hereby is allowed to the Supreme Court of the United States from the Supreme Court of Mississippi, as prayed for in said petition, and that the Clerk of the Supreme Court of Mississippi shall prepare and certify a transcript of the record, proceedings, and judgment in the above cause and transmit the same to the Supreme Court of the United States within forty days from the date hereof.

Further ordered that said Interstate Oil Pipe Line Company shall give good and sufficient security in the sum of [fol. 117] Five Hundred ($500.00) Dollars, that it shall prosecute said appeal to effect, and if it fail to make its plea good, shall answer all damages and costs.

And said appellant now presenting a bond in the sum of Five Hundred ($500.00) Dollars, with United States Guarantee Company of New York, as surety, it is

Ordered that the same be, and is hereby, approved.

Dated August 11, 1948.

V. A. Griffith, Chief Justice of the Supreme Court of Mississippi.

[fols. 118-119] Cost Bond on Appeal for $500.00 approved and filed Aug. 11, 1948, omitted in printing.

[fol. 120-121] Citation in usual form showing service on A. H. Stone, filed Aug. 11, 1948, omitted in printing.

[fol. 122] [File endorsement omitted]

IN THE SUPREME COURT OF MISSISSIPPI

[Title omitted]

ASSIGNMENT OF ERRORS ON APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed August 11, 1948

Your petitioner, Interstate Oil Pipe Line Company, a corporation, assigns the following errors in the record and proceedings in the said case:

I

In said suit there was drawn in question the validity of a statute of the State of Mississippi, to-wit, the General Sales Tax Law of said State, incorporated in Section 10,105 and 10,109, Title 40, Chapter 3, Volume 7 of the 1942 Code of Mississippi, as amended, on the ground that, as applied in this suit it was repugnant to Article I, Section 8, Clause 3 of the Constitution of the United States, known as the Commerce Clause, and hence invalid, and the decision of the Supreme Court of Mississippi was in favor of the validity of the said statute, which decision is hereby assigned as error.

[fol. 123] II

Petitioners transportation of crude oil by pipe line constituted interstate commerce. The State of Mississippi was and is without power to tax the privilege of engaging in such commerce. The said statute of Mississippi, as applied by appellee and by the Supreme Court of Mississippi, levies a tax of 2% of the gross proceeds of said transportation, directly taxes the privilege of engaging in, and is a burden upon interstate commerce, is repugnant to Article I, Section 8, Clause 3 of the Constitution of the United States and is invalid, and the Supreme Court of the State of Mississippi erred in not so holding and adjudging.

For which errors, petitioner prays that said judgment of the Supreme Court of Mississippi in the above entitled cause be reversed insofar as it sustains the tax of $20,296.36 col-

lected from this petitioner and a judgment be rendered in favor of petitioner therefor.

Dated August 11th, 1948.

Villard Martin, Joseph L. Seger, Phelan H. Hunter, Frank R. Clark, Jr., Garrett Logan, Attorneys for Petitioner and Proposed Appellant.

[fol. 124-155] [File endorsement omitted]

IN THE SUPREME COURT OF MISSISSIPPI

[Title omitted]

PRAECIPE FOR RECORD TO BE TRANSMITTED TO THE SUPREME COURT OF THE UNITED STATES—Filed August 11, 1948

To the Clerk of the Supreme Court of Mississippi:

You are hereby requested to make and certify a transcript of the record to be filed in the Supreme Court of the United States pursuant to an appeal allowed in the above entitled cause, and to include in such transcript of the record the following, and no other papers and exhibits, to-wit:

1. Declaration originally filed in this cause in the Circuit Court of the First District of Hinds County, Mississippi;

2. Answer originally filed in this cause in the Circuit Court of Hinds County, Mississippi;

3. Agreed Statement of Facts originally filed in this cause in the said Circuit Court;

4. Judgment of the said Circuit Court;

5. Petition for Appeal in the Supreme Court of Mississippi;

6. Assignment of Errors on Appeal From Said Circuit Court;

7. Order and Judgment of the Supreme Court of Mississippi entered herein April 26, 1948;

8. Suggestion of Error filed herein by Appellant;

[fol. 156] 9. Suggestion of Error filed herein by Appellee;

10. Order and Judgment of the Supreme Court of Mississippi entered herein June 14, 1948;

11. Petition for Appeal to the Supreme Court of the United States;

12. Assignment of Errors on Appeal to the Supreme Court of the United States;

13. Jurisdictional Statement on said Appeal;

14. Order Allowing Appeal to the Supreme Court of the United States;

15. Bond on Appeal to the Supreme Court of the United States;

16. Citation and proof of service thereof;

17. Proof of Service of copy of petition for and order allowing the appeal, assignments of error, jurisdictional statement and statement directing attention to the provisions of Paragraph 3 of Rule 12 of the Rules of the Supreme Court of United States;

18. Any statement or motions which may be filed by appellee pursuant to provision of Paragraph 3, Rule 12, of the Rules of the Supreme Court of the United States;

19. This praecipe and service thereof;

20. Opinion of the Supreme Court of Mississippi herein rendered April 26, 1948;

21. Opinion of the Supreme Court of Mississippi herein rendered June 14, 1948.

Said transcript to be prepared as required by law and the rules of this Court and the rules of the Supreme Court of the United States, and to be filed in the office of the Clerk of The Supreme Court of the United States, at Washington, D. C., on or before September 21st, 1948.

Dated August 12, 1948.

Villard Martin, Joseph L. Seger, Phelan H. Hunter, Frank R. Clark, Jr., Garrett Logan, Attorneys for Appellant.

[fol. 157] Service of the above praecipe accepted and acknowledged this 11th day of August, 1948.

J. H. Sumrall, Attorney for Appellee.

[fol.158] Clerk's Certificate to foreging transcript omitted in printing.

[fol. 159] IN THE SUPREME COURT OF THE UNITED STATES

[Title omitted]

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY—Filed September 27, 1948

Appellant, Interstate Oil Pipe Line Company, in its appeal herein from the judgment of The Supreme Court of Mississippi, intends to rely on the following points as error:

1. The said Court erred in not holding that appellant's transportation of crude oil by pipe line constituted interstate commerce.

2. The said Court erred in not holding invalid as applied the statute of Mississippi imposing a tax of 2% of the gross receipts of the appellant's business of transporting crude oil by pipe line for hire.

3. In said suit there was drawn in question the validity of a statute of the State of Mississippi, to-wit, the General Sales Tax Law of said State, incorporated in Sections 10,105 and 10,109, Title 40, Chapter 3, Volume 7 of the 1942 Code of Mississippi, as amended, on the ground that, as applied in this suit it was repugnant to Article I, Section [fol. 160] 8, Clause 3 of the Constitution of the United States, known as the Commerce Clause, and hence invalid, and the decision of the Supreme Court of Mississippi was in favor of the validity of the said statute, in which decision the Court erred.

4. Appellant's transportation of crude oil by pipe line constituted interstate commerce. The State of Mississippi was and is without power to tax the privilege of engaging in such commerce. The said statute of Mississippi, as applied by appellee and by the Supreme Court of Mississippi, levies a tax of 2% of the gross proceeds of said transportation, directly taxes the privilege of engaging in, and is a burden upon interstate commerce, is repugnant to Article I, Section 8, Clause 3 of the Constitution of the United States and is invalid, and the Supreme Court of the State of Mississippi erred in not so holding and adjudging.

Villard Martin, Garrett Logan, Attorneys for Appellant.

Due service and receipt of a copy of the within statement of points on which appellant intends to rely admitted this September 24th, 1948.

J. H. Sumrall, Attorney for Appellee.

[fol. 161] IN THE SUPREME COURT OF THE UNITED STATES

[Title omitted]

DESIGNATION OF PORTION OF THE RECORD TO BE PRINTED—Filed September 27, 1948

Pursuant to the rules of this Court the appellant Interstate Oil Pipe Line Company, a corporation, designates the whole of the record as filed to be printed, except the jurisdictional statement, being Item 13 in the praecipe for record to be transmitted to this Court.

Villard Martin, Garrett Logan, Attorneys for Appellant.

Due service and receipt of a copy of the within designation admitted this September 24th, 1948.

J. H. Sumrall, Attorney for Appellee.

[fol. 161a] [File endorsement omitted]

[fol. 162] SUPREME COURT OF THE UNITED STATES

ORDER NOTING PROBABLE JURISDICTION—October 18, 1948

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

Endorsed on Cover: Enter Villard Martin. File No. 53,289. Mississippi, Supreme Court, Term No. 287. Interstate Oil Pipe Line Company, Appellant, vs. A. H. Stone, Chairman State Tax Commission. Filed September 18, 1948. Term No. 287 O. T. 1948.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 287

INTERSTATE OIL PIPE LINE COMPANY,
Appellant,

vs.

A. H. STONE, CHAIRMAN STATE TAX COMMISSION

APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

STATEMENT AS TO JURISDICTION

VILLARD MARTIN,
JOSEPH L. SEGER,
PHELAN H. HUNTER,
FRANK R. CLARK, JR.,
GARRETT LOGAN,
Counsel for Appellant.

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STATUTES CITED

Section 237(a) Judicial Code, as amended (28 U.S.C.A., 344(a)) 1

Commerce Clause, U. S. Constitution (Art. I, Sec. 8, Cl. 3) 3

Mississippi Sales Tax Statute, Secs. 10,107 and 10,109, Title 40, Chap. 3, Vol. 7, 1942 Code of Mississippi, as amended 2

SUPREME COURT OF MISSISSIPPI

No. 36,672

INTERSTATE OIL PIPE LINE COMPANY, A CORPORATION;

Appellant,

vs.

A. H. STONE, CHAIRMAN STATE TAX COMMISSION,

Appellee

JURISDICTIONAL STATEMENT

I. Statute Sustaining Jurisdiction and Nature of the Case

Section 237(a) of the Judicial Code, as amended (36 Stat. 1156, 43 Stat. 937, 45 Stat. 54, 28 U.S.C.A., 344(a)) is believed to sustain the jurisdiction of the Supreme Court of the United States.

This is an appeal from a judgment of the Supreme Court of Mississippi wherein appellant, Interstate Oil Pipe Line Company, a common carrier, was denied the right to recover from A. H. Stone, Chairman of the State Tax Commission of Mississippi, taxes in the amount of $20,296.36 which appellant paid under protest and brought this suit to recover, with interest and costs. Although denominated a sales tax, the tax is in fact a privilege tax on account of the business engaged in, computed at 2% of gross income

from the business of operating a pipe line. And although the gross income upon which the taxes were collected was derived from transporting oil from one point to another within the State and loading it aboard tank cars for shipment to destinations outside the State, appellant's activities were a part of the continuous interstate transportation of the oil from the producing leases to the out of state destinations, and as applied the taxing statute is repugnant to the Commerce Clause of the Constitution of the United States and void. (The judgment awarded to appellant refund of other taxes claimed in the suit.)

II. State Statutes, the Validity of Which Are Involved

The statutes of the State of Mississippi, the validity of which are drawn in question, are contained in Sections 10,105 and 10,109, Title 40, Chapter 3, Volume 7 of the 1942 Code of Mississippi, as amended, and are in pertinent part as follows:

> 10,105. There is hereby levied and shall be collected annual privilege taxes, measured by the amount or volume of business done, against the persons, on account of the business activities, and in the amounts to be determined by the application of rates against values, or gross income, or gross proceeds of sales, as the case may be, as follows (see sections following).
>
> 10,109. * * * Upon every person engaging or continuing within this state in the business of operating a pipe line for transporting for compensation or hire from one point to another in this state oil or natural gas or artificial gas through pipes or conduits in this state, there is likewise hereby levied and shall be collected a tax, on account of the business engaged in, equal to two per cent of the gross income of the business. * * *
>
> There shall be excepted from the gross income used in determining the measure of the tax imposed in this

section so much thereof as is derived from the business conducted in commerce between this state and other states of the United States, or between this state and foreign countries which the State of Mississippi is prohibited from taxing under the constitution of the United States of America * * *.

III. Dates of Judgments and Appeal

The final judgment of the Supreme Court of Mississippi was rendered June 14, 1948 on Suggestions of Error (equivalent to petition to rehear in other jurisdictions) concerning an opinion rendered April 26, 1948. In overruling the Suggestions of Error the Court withdrew certain portions of its first opinion concerning taxes not involved in this appeal.

Petition for appeal to this Court was presented to Honorable Virgil A. Griffith, Chief Justice of the Supreme Court of Mississippi on the 11 day of August, 1948, and the appeal was allowed by him the same day.

IV. Manner in Which Federal Question Was Raised

The invalidity of the Mississippi statute, as applied, because of its repugnancy to the Commerce Clause of the Constitution of the United States, was raised at the beginning of and urged throughout all the proceedings in the State Court.

In its declaration filed in the trial court for recovery of the tax paid under protest, appellant alleged the facts concerning the business conducted by it and that the taxes are "in violation of the Commerce Clause of the Constitution of the United States, Article I, Section 8, Clause 3". (Par. XIII) and that "if the said General Sales Tax Law" is "applicable to plaintiff in the levy of the said sales taxes and use taxes, and said laws are void and of no effect because" they impose a license on interstate commerce, place a burden on plaintiff's privilege of carrying on interstate

commerce, constitute a direct burden on the transportation of crude oil exclusively in interstate commerce, and constitute a tax directly on interstate commerce or the privilege of engaging therein (Par. XIV). Defendants pleading denied these allegations (Pars. XIII, XIV). The trial court rendered judgment against appellant.

On appeal to the Supreme Court of Mississippi, an assignment of error was:

> "That if the General Sales Tax Law" * * * (is) "applicable to Appellants activities as set out in this suit, then said laws are void and of no effect by reason of the fact that they are in conflict with Article I, Section 8, Clause 3, of the Constitution of the United States, known as the Commerce Clause".

In its opinion of April 26, 1948, The Supreme Court of Mississippi said as to these taxes:

> "The liability therefor is contested by the pipe line company on two grounds: * * * (2) that the taxpayer's transportation of the oil was in interstate commerce, and that, therefore, the imposition of both of the taxes here in question violates the commerce clause of the Constitution of the United States * * *".

That Court held that appellant's transportation of crude oil was a local activity, did not constitute interstate commerce and that the tax on the revenues received by appellant for such transportation was properly collected. (See opinions attached to this statement.) In so holding, the Court of necessity passed on the federal constitutional question raised by appellant, and sustained the validity of the state statute as applied to appellant's business activities.

Appeal is the proper method of reviewing a state court judgment which upholds a state tax statute over objection that the statute, as applied, imposes an unconstitutional tax upon interstate commerce, although the state court, in up-

holding the statute as so applied, construes the statute as applying only to intrastate commerce, as it applied it. *Eureka Pipe Line Co. v. Hallanan*, 257 U. S. 265, 66 L. Ed., 227; *Dahnke-Walker Milling Co. v. Bondurant*, 257 U. S., 282, 66 L. Ed., 239.

V. The Federal Question Involved Is Substantial

The case was tried on an agreed statement of facts. Appellant is a common carrier engaged only in the business of gathering and transporting, by pipe line, crude oil for various shippers for hire. It operates under the jurisdiction of the Interstate Commerce Commission, and all of its transportation of oil in Mississippi is covered by tariffs which are regularly published and filed with that Commission. During the period January 1, 1944 to June 30, 1946, appellant had installed and operated gathering systems for the transportation of crude oil from lease tanks situated at or near oil wells in various fields in Mississippi to loading racks at the tracks of railroad at several points in Mississippi. All the oil gathered by appellant and loaded aboard tank cars was tendered for shipment by the owner or purchaser at the lease tanks in the producing fields prior to the movement of the oil. The shipper furnished appellant a "tender of shipment" form for each shipment which specified the quantity of oil to be moved, the origin and ultimate out-of-state destination, the tariff under which the shipment was made, and shipping instructions as to consignee, route of shipment and so on. Appellant obtained from the railroad bills of lading and other papers showing the consignor of the oil as shipper, with appellant as its agent, and indicating the destination previously specified by the shipper. At the loading racks, without any interruption or delay other than necessary for the spotting of the cars by the railroad, the oil was loaded into tank cars for shipment by railroad to points outside the State of Mississippi and

was, in fact, transported to such out-of-state points in continuous interstate commerce.

The tax involved is 2% of the amounts paid by shippers to appellant for its services in gathering, transporting and loading the oil. It was said by The Supreme Court of Mississippi to be a "privilege tax for operating these pipe line systems for transporting the oil." The statute also says it is "a tax on account of the business engaged in."

Where a Federal right is concerned, the State Court's characterization of the tax is not conclusive and does not relieve the Federal Court of the duty of considering the real nature of the tax and its effect upon the Federal right asserted. *U. S.* v. *Allegheny County*, 322 U. S., 174, 88 L. Ed., 1209; *Reconstruction Finance Corp.* v. *Beaver County, Pennsylvania*, 328 U. S. 204, 90 L. Ed., 1172; *Richfield Oil Corp.* v. *State Board of Equalization*, 329 U. S., 69, 91 L. Ed., 80.

Appellant had no control over the destination of the shipments, but simply carried the oil as far as its lines ran and then turned it over to another carrier, the railroad, by loading it into tank cars to complete the trip to destination. Only the owner of the oil could stop this interstate movement. The possibility of the owner's changing his mind does not change the essential character of the shipment. The interstate movement commenced at the lease tanks were the oil was taken into appellant's lines, which are but a "link in continuous transportation from one state to another." *The Daniel Ball*, 10 Wall. 557, 19 L. Ed., 999; The *Norfolk & Western R. Co.* v. *Pennsylvania*, 136 U. S., 114, 34 L. Ed., 394; *Eureka Pipe Line Co.* v. *Hallanan, supra*, 257 U. S., 265, 66 L. Ed., 227; *Hughes Brothers Timber Co.* v. *Minnesota*, 272 U. S., 469, 71 L. Ed., 359; *Joseph* v. *Carter & Weekes Stevedoring Co.*, 330 U. S., 422, 91 L. Ed., 993; *U. S.* v. *Yellow Cab Co.*, 332 U. S. 218, 91 L. Ed., 2010.

The "Commerce Clause even without implementing legislation by Congress is a limitation upon the power of the States." *Freeman* v. *Hewit*, 329 U. S. 249, 91 L. Ed. 265. "Taxation does amount to regulation." *Philadelphia & S. Mail S. S. Co.* v. *Pennsylvania*, 122 U. S. 326, 30 L. Ed. 1200."

We think the statute cannot be sustained as non-discriminatory. The fact is that interstate commerce only is within the statute's field of operation. The Supreme Court of Mississippi said: "Most assuredly, no pipe line company would be deemed justified in installing an oil gathering system to transport oil other than that destined for ultimate interstate shipment, there being no oil refineries here."

The tax, being a stated per cent of the gross proceeds of the business of engaging in interstate commerce, is a direct tax upon such commerce, and the statute is void for repugnancy to the Commerce Clause. It is immaterial that appellants' operations took place wholly within the state. *New Jersey Bell Telephone Co.* v. *State Board of Taxes and Assessment*, 280 U. S. 338, 74 L. Ed. 463; *Texas Transport and T. Co.* v. *New Orleans*, 264 U. S. 150, 68 L. Ed. 611; *Fisher's Blend Station* v. *Tax Com.*, 297 U. S. 650, 80 L. Ed. 956; *Puget Sound Stevedoring Co.* v. *Tax Com.*, 302 U. S. 90, 82 L. Ed. 68; *Joseph* v. *Carter & Weekes Stevedoring Co.*, *supra*, 330 U. S. 422, 91 L. Ed. 993. There is here no franchise tax upon the right to exist as a corporation or to exercise corporate powers, such as was sustained in *Memphis Natural Gas Co.* v. *Stone*, No. 94, October Term 1947, decided June 21, 1948. Appellant has paid the franchise tax which was there involved, as well as an income tax on its net income allocated to Mississippi, and substantial *ad valorem* taxes on its properties situated within that state. The tax here sought to be applied is an unapportioned direct tax upon the gross receipts from interstate transportation.

VI. Opinions of Court Below

Appended to this statement are copies of the opinions of the Supreme Court of Mississippi rendered in this case April 26, 1948 and June 14, 1948.

VII. Conclusion

It is respectfully submitted that the Supreme Court of the United States has jurisdiction of this appeal under Section 237(a) of the Judicial Code, as amended.

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APPENDIX A

IN THE SUPREME COURT OF MISSISSIPPI

No. 36,672

(Opinion rendered April 26, 1948)

In Banc:

INTERSTATE OIL PIPE LINE CO.

vs.

A. H. STONE, Chairman State Tax Commission

McGEHEE, *J.:*

This is a suit wherein the appellant Interstate Oil Pipe Line Company seeks a refund of taxes in the sum of $25,326.63 which it paid on March, 4, 1947, to the appellee A. H. Stone, Chairman of the State Tax Commission, for the period from January 1, 1944, to June 30, 1946, inclusive.

During the period aforesaid the appellant, a Delaware corporation which had qualified to do business in this State, owned and operated several pipe line systems for gathering crude oil from tanks on producing leases in numerous oil fields in Mississippi and transporting the same to some local shipping point on a nearby railroad where the same was in each instance transported in due time by the railroad company to an out of state destination.

The pipe line systems, respectively, consisted of pipes extending from a central or main line so as to connect with the oil tanks located on producing leases in the vicinity of the wells and thence to the loading racks or stations of the pipe line company adjacent to the railroad. At the oil tanks near the producing wells there were pumps installed by said company with which it pumped the oil from the tanks into its pipe line and then to the railroad, where it again pumped the same from its loading racks or tanks into the railroad tank cars as soon as such cars were "spotted" for that purpose.

The pipe line company made one charge of a few cents per barrel for pumping the oil from the lease tanks at the oil fields into its pipe line and thence to the railroad shipping point, the amount received for such service depending upon the distance to the railroad from each oil field, and then a separate and additional charge of two cents per barrel for pumping the same from its loading *tacks* or tanks, into the railroad tank cars. Of course, it received no part of the charges collected by the railroad company for transporting the oil across the state line to its destinations. In fact, it had no contractual relation with the railroad company in connection with the latter's said interstate transportation of such oil.

The privilege tax for operating these pipe line systems for transporting the oil from one point to another in this State as well as the Use Tax on the use of the tangible personal property used in connection therewith were collected pursuant to assessments made after proper notices given and hearings had thereon in compliance with due process of law. The liability therefor is contested by the pipe line company on two grounds: (1) It contends that Sections 10105 and 10109, Code 1942, under which $20,296.63 of the amount involved was paid as a privilege tax for operating the pipe lines for transporting crude oil from one point to another in this State, and also Sections 10148 and 10149, Code 1942, under which the remaining $5,030.27 was paid as a Use Tax on its tangible personal property used in the operation of the pipe lines, contain express exemptions against liability therefor under the admitted facts of the case; and (2) that the taxpayer's transportation of the oil was in interstate commerce, and that, therefore, the imposition of both of the taxes here in question violates the commerce clause of the Constitution of the United States, Article I, Section VIII, Clause 3 thereof, without regard to the alleged statutory exemption claimed in each instance.

The case was heard in the Circuit Court upon the pleadings and an agreed statement of the facts as to the method aforesaid whereby the business of the taxpayer was conducted in this State, and also as to the circumstances hereinafter mentioned under which it procured and brought into

this State the tangible personal property used in the construction and operation of its pipe lines; and with the result that the trial court denied liability for the refund of all the taxes in question.

We are of the opinion that the Court was correct in disallowing a refund of the tax in the sum of $20,296.63, which had been collected for the privilege of operating the pumping machinery and other pipe line equipment in the transportation of oil in the manner hereinbefore set forth, but that the Court was in error in disallowing a refund of the Use Tax of $5,030.27, for reasons hereinafter stated.

We shall discuss the question of liability for these taxes respectively in reverse order. Section 10148, Code 1942, assesses and levies "a tax or excise for the privilege of use, * * *, of any article of tangible personal property" in this State, equal to 2% of the purchase price thereof, and Section 10149, Code 1942, provides that "The tax levied by this act shall not be collected in the following instances: * * * (d) On the use * * * of tangible personal property used * * * in the furtherance of interstate transportation or interstate commerce, or on the use, * * * of any property * * *, which is not procurable in the ordinary channels of trade in the State of Mississippi." And Section 10146, Code of 1942, relating to this Use tax recites, among other things, that "the primary purpose of which (the statute) is hereby declared to be the imposition of a tax for the privilege of using, * * *, tangible personal property; * * *, and to protect, insofar as may be proved practicable, the merchants, dealers, manufacturers and persons engaged in businesses of rendering services in Mississippi, who operate under the privilege tax laws of this State, who pay the taxes imposed thereby, and who meet the requirements of the Mississippi sales tax laws, against the unfair competition of importation of goods and services into Mississippi without the payment of the retail sales tax imposed for the sale of goods, wares and merchandise usually carried for sale in this State, * * *."

It is agreed that $4,362.75 of the $5,030.27 was paid for the privilege of using tangible personal property in the construction and operation of the pipe line gathering sys-

tems hereinbefore mentioned, and that the remaining $667.52 was paid for the privilege of using certain copper wire, glass insulators, fittings, hardware, brackets, lamps, screws, and other supplies in constructing a telephone system adjacent to *an interstate trunk pipe line* right-of-way separate and apart from the oil gathering pipe line systems hereinbefore mentioned, and that the same was necessary to and used solely in connection with the *dispatching and movement of interstate shipments* and the servicing and maintenance of its said *interstate trunk line system.*

It is further agreed that the total amount of the said Use tax was computed and paid upon the purchase price of material brought from without the State by the pipe line company "and that none of said property was available for purchase from stock piles in the State, but that all such materials were procurable from sales agents then operating in the State, who might have forwarded orders to suppliers located outside the State for shipment by said suppliers to appellant in Mississippi"; and from this factual situation we are asked to determine the question of whether or not such property was "procurable in the ordinary channels of trade in the State of Mississippi," and also whether or not the same was used "in the furtherance of interstate transportation or interstate commerce" by the pipe line company.

We do not think that the fact that such materials were procurable through sales agents then operating in the State who could have forwarded orders to outside manufacturers or dealers meant that such materials were "procurable in the ordinary channels of trade in the State of Mississippi." If merchants, dealers, manufacturers and others engaged in businesses in this State could not supply the demand for this material, then there could be no "unfair competition" with them by non-residents engaged in manufacturing and selling the same, since the taxpayer had to resort to placing orders through such sales agents in the State to procure the materials from manufacturers or dealers outside thereof. We are therefore of the opinion that under Section 10149 there could be no liability in the instant case for the Use tax whether the property was used "in the furtherance of interstate transportation or inter-

state commerce" or not, since the statute by its very language provides that the tax shall not be collected *either* on the use of tangible personal property used "in the furtherance of interstate transportation or interstate commerce" *or* on the use of such property "which is not procurable in the ordinary channels of trade in the State of Mississippi."

Except for the agreed statement of facts to the contrary, we would naturally assume that the enumerated articles for the use of which the said $667.52 was paid were procurable in the ordinary channels of trade in the State of Mississippi. However, that fact becomes immaterial here for the reason that it is further agreed, as hereinbefore shown, that such supplies were used in connection with the operation of *an interstate trunk pipe line* of the appellant, taxpayer whereby it transported oil from the tanks on producing leases on its ultimate and final passage from this State into other states in interstate commerce, such trunk line being operated entirely separate and apart from the oil gathering systems involved herein for transporting oil from one point to another in this State.

And referring further to the remaining $4,362.75 of the Use tax which was paid for the privilege of using the tangible personal property in the construction and operation of the oil pipe line gathering systems for transporting oil from one point to another in this State, it should be noted that aside from the fact that said property was "not procurable in the ordinary channels of trade in the State of Mississippi" the same was *at least* used "in the furtherance of interstate transportation or interstate commerce" in which the railroad companies were engaged when transporting the oil on its ultimate journey from the local shipping points and cross the State line to its out-of-state destinations.

And now passing to the exemption claimed for the privilege taxes of $20,296.36 levied and collected for operating the pipe lines for transporting the oil from one point to another in this State, we find that Section 10105, Code 1942, levies annual privilege taxes, measured by the amount or volume of business done, on the basis of .2% of the gross income therefrom, or gross proceeds of sales, as the case

may be, as follows: (1) Upon every person engaging or continuing within this State in the business of mining, etc., levied by Section 10106, of said Code; and (2) on every person engaging or continuing within this State in the business of manufacturing, etc., levied by Section 10107, of said Code; (3) on every person engaging or continuing in this State in the business of selling any tangible property whatsoever, real or personal, (not including, however, bonds or other evidence of indebtedness, or stocks) levied by Section 10108 of said Code; and (4) upon every person engaged or continuing within this State in the business of operating certain other public utilities, including those "operating a pipe line for transporting from one point to another in this State oil * * * through pipes or conduits in this State," levied by Section 10109 of said Code.

In the latter Section, which is now under consideration, there is included a tax on those operating numerous other public utilities insofar as the business done by them from one point to another in this State is concerned, the tax in each instance being measured by 2% of the gross income of such intrastate business. They too have paid *ad valorem* franchise and other taxes paid by this pipe line company in addition to the privilege tax levied by the statute here involved.

And Section 10109, supra, expressly excepts from the gross income of all these public utilities, used in determining the measure of the tax, so much thereof as is derived from commerce between this and other States, "which the State of Mississippi is prohibited from taxing under the Constitution of the United States of America."

By the above exception the Legislature seems to have recognized that many of the utilities enumerated in said Section of the Code are engaged in both intrastate and interstate commerce, that all activity in the State having a relation to interstate commerce is not exempt from bearing its share of local taxation by the commerce clause of the Federal Constitution, and by thus excepting from the gross income used in determining the measure of the tax so much thereof as is derived from business conducted in commerce between this and other States "which the State of Mississippi is prohibited from taxing under the Constitution of the

United States of America" it was made known that it was not the purpose of the Legislature to attempt to burden interstate commerce *as such* by the levy of a tax measured by a per cent of the gross income derived therefrom.

It is the uniform rule laid down by all of the Courts that tax exemption statutes should be strictly construed and that when any doubt arises as to whether or not an exemption is granted by such statute the doubt must be resolved against the exemption. The citation of authorities in support of this principle is deemed unnecessary.

It is to be conceded, however, that in considering the privilege tax imposed by Sections 10105 and 10109, supra, here in question, which as a matter of convenience and best available means of fixing the amount thereof is to be measured by a per cent of the gross income of the business done by the taxpayer, any reasonable doubt as to whether or not the business done by the taxpayer can be detached in its main and essential feature as a local activity must be resolved in favor of the taxpayer in connection with the said requirement that when the taxpayer is relying upon an exemption the claim of nonliability is to be clearly sustained under the proven facts in the light of the burden of proof resting upon the taxpayer to establish that the case comes within such exemption.

If the exemption was intended to apply under the facts of the instant case, then the levy of the tax on the privilege of operating a pipe line for the transportation of oil from one point to another in the State could have served no useful purpose, since it was known that all of the oil transported by pipe line from producing leases or elsewhere would be transported to destinations outside the State either by interstate trunk pipe lines, on a continuous journey, or likewise by railroad from local shipping points within the State. If by the former method, it would of course constitute that character of commerce "which the State of Mississippi is prohibited from taxing under the Constitution of the United States," and this would be equally true as to the movement by rail of oil from a local shipping point to its destionation outside the State in crossing the state line. Hence, the statute was designed only for the purpose of taxing the privilege of operating a pipe line for transporting the oil

from one point to another in the State where it is then delivered to an interstate carrier prior to the beginning of its ultimate passage to a foreign state in interstate commerce. Most assuredly, no pipe line company would be deemed justified in installing an oil gathering system to transport oil other than that destined for ultimate interstate shipment, there being no oil refineries here.

During the period for which these taxes were collected, the taxpayer as heretofore stated was transporting some oil from within the State to outside destinations by an interstate trunk pipe line, and subsequent to the expiration of the said two and a half year period in question it has transported practically all of the oil handled by it for the owners and shippers thereof by means of oil trunk pipe lines to out of state destinations, and for which particular activity no tax has ever been demanded or collected. The entire tax collected, and for which a recovery is sought herein was measured by a per cent of gross receipts of the business done in transporting oil from one point to another in this State through its local oil gathering systems and for loading the same into railroad tank cars as hereinbefore described. Therefore, it appears that insofar as its own activities in that regard and the services of its employees in this State in that behalf were concerned, this pipe line company was an intrastate carrier. It transported no oil across the State line in the operation of such local pipe lines, that is to say, the essential and controlling feature of its business from which the tax in question was collected was the transportation of oil from one point to another in intrastate commerce. It was not employed or hired to transport oil to any destination outside the state, but only to transport the same to the railroad and then pump it into the railroad tank cars as a local activity, insofar as the right of taxation of its privilege of operating the intrastate pipe line is concerned.

It is agreed that the said taxpayer received the oil at the leased tanks at or near the place of production under a "tender of shipment" from the owner, supplied by the taxpayer, which showed the consignee and ultimate destination thereof to be outside the State, etc., and it thereafter obtained for such owner from the railroad company a bill of

lading at the time the same was delivered to such interstate railroad carrier. But "it is not within the power of the parties by the form of their contract to convert what is exclusively a local business, subject to state control, into an interstate business, protected by the commerce clause". 51 Am. Jur. p. 29. And to the same effect is the rule announced in 15 C. J. S. p. 278. In other words, neither the form of contract nor method of billing is controlling on the question of whether the pipe line company was employed to do more than render a local service for the owner of the oil by pumping the same out of the lease tanks and through its pipe line to where it could be later pumped and loaded by said company into the railroad tank cars to be started on its ultimate interstate passage.

In 51 Am. Jur., Section 205, page 266, it is said: "It is generally held that a movement merely in preparation for export—in other words, a mere transfer of the property to a depot or other place within a state from which the transportation or journey to another state is to begin at a convenient time—is not a part of that transportation, so as to exempt the property because of such transfer movement from state taxation upon the ground of the interference or burden upon interstate commerce." Numerous authorities are cited to support this announcement, including the case of *Coe* v. *Errol*, 116 U. S. 517, 29 L. Ed. 715, wherein the Court said: "But this movement (in interstate commerce) does not begin until the articles have been shipped or started for transportation from the one State to the other. The carrying of them in carts or other vehicles or even floating them to the depot where the journey is to commence, is no part of that journey * * *. Until actually launched on its way to another state or committed to a common carrier for transportation *to such state*, its destination is not fixed and certain. It may be sold or otherwise disposed of within the state and never put in course of transportation out of the State. Carrying it from the farm or the forest to the depot is only an interior movement of the property entirely within the state, for the purpose, it is true, but only for the purpose, of putting it into a course of exportation; it is no part of the exportation itself. Until shipped or started on

its final journey out of the state, its exportation is a matter altogether in *fieri* and not at all a fixed and certain thing." (Italics ours) Here the oil was not committed by the owner to this pipe line company for transportation to another state, but to be transported to the railroad and there loaded into tank cars.

In the instant case, the owner of the oil could have directed the pipe line company as its agent to divert the proposed shipment from its intended out-of-state destination and caused it to be shipped to the Gulf Coast of the state, to be sold there, or so as to otherwise prevent its interstate transportation, and to obtain a bill of lading to that end, instead of procuring for the owner a bill of lading to the originally contemplated out-of-state destination, and this could have been done without working a breach of the tender of shipment under which the pipe line company had received the oil, since the interest of the said pipe line company, unlike that of the railroad company, could not be affected one way or the other by the diverting of the shipment, for the reason that the pipe line company was to receive no part of the charges to accrue after the oil was loaded into railroad tank cars for its final destination.

The said tender of shipment provided, among other things, that the "crude petroleum accepted for gathering and transporting shall be subject to a lien for all such (tariff) charges (for transporting the oil to the railroad and loading the same) and said lien shall attach to any crude petroleum not yet delivered to destination for all unpaid charges arising hereunder on the crude petroleum covered by the same tender".

It is to be conceded that the lien above mentioned, as well as the local activities of this taxpayer in the operation of its pipe line for transporting oil from one point to another in this State, together with its tangible personal property employed in the operation of said business, enjoys the protection of the state laws. Also, that the particular tax hereunder consideration is not a tax on a commodity in transit. Nor is it a direct tax upon such gross receipts. It is a tax on the local business of operating the pipe line, and as heretofore stated the amount thereof is measured by 2% of the

gross receipts derived therefrom, as a matter of convenience. That is to say, it is merely a tax on the privilege of engaging in a local activity insofar as this taxpayer was concerned. Moreover, it is not measured by a per cent of the entire gross income received from the transportation of the oil from the tanks on the producing leases to its out of state destination, since the gross income received by the railroad company for transporting the oil on its ultimate journey beyond the State in interstate commerce is no part of the measure of the tax.

It may be also conceded for the purpose of this decision, but without admitting that the pipe line company is engaged in interstate commerce, that there is no appreciable interruption at the railroad shipping point in the continuity of the transportation of the oil from the tanks on the producing oil leases to its out of state destinations, though it is pumped from said tanks to the railroad under a tender of shipment, furnished to the owner by the pipe line company, to where it reaches the loading racks or stations on the railroad and is thence later, as soon as cars arrive, shipped by rail out of the State under a bill of lading obtained from the railroad company by the pipe line company as agent of the owner of such oil.

In the case of *Stone* v. *Memphis Natural Gas Co.*, — — Miss. — —, 29 So. (2d) 268, this Court upheld "a franchise or excise tax" levied and assessed by Section 9314, Code 1942 against the said gas company, a Delaware corporation which had not even qualified to do business in this State, and where the stipulation of facts stated that the said "appellee company is not, and has not been, engaged in any intrastate commerce in Mississippi, but that its business, so far as concerns this State, has been interstate solely and exclusively; that it has only one customer in the State, and to this customer it delivers gas wholesale, under a contract made in another State."

The said gas company then owned and operated a natural gas pipe line running from the Monroe gas field in Louisiana to Memphis, Tennessee, and beyond, entering Mississippi south of Greenville and extending for a distance of approximately 135 miles through this State, along which line it

maintained two compressing stations in this State. The contention made in that case was that no tax of any kind could be levied by the State of Mississippi against the pipe line company other than the *ad valorem* taxes which it had already paid, and that any other tax, and particularly a franchise tax, would be to tax interstate commerce.

While the tax upheld in that case was a franchise tax as distinguished from the privilege tax involved in the case at bar, it was nevertheless a tax on the right and privilege of exercising its corporate powers and enjoying the protection of the state laws in the use and maintenance of its property for the conduct of its business, and we are of the opinion that what was said by the court in sustaining the tax was in keeping with the modern trend of the decisions of the Supreme Court of the United States upon the right of a State to require one whose property and business enjoys the protection of local laws to bear its proper share of the expense of the State government, where the tax is non-discriminatory and does not constitute a *direct* burden on interstate commerce; and of which modern trend we have ample evidence in what was said in the case of *McGoldrick v. Berwind-White Coal Co.*, 309 U. S. 33, 84 L. Ed. 565, even though the factual situation in that case was likewise different to that involved in the case at bar.

In this connection we said in the case of Stone *v.* Memphis Natural Gas Co., supra:

"It is to be seen that there is no attempt to tax interstate commerce as such, but the levy is an exaction which the State requires as a recompense for its protection of lawful activities carried on in this State by the corporation, foreign or domestic, activities which are incidental to the powers and privileges possessed by it by the nature of its organization—here the local activities in maintaining, keeping in repair, and otherwise in manning the facilities of the system throughout the 135 miles of its line in this State." We then cited Stone *v.* International Natural Gas Co., 308 U. S. 522, 84 L. Ed. 442; Stone *v.* General Contract Purchase Corp., 193 Miss. 301, 312, 7 So. (2d) 806; and Stone *v.* General Electric Contracts Corp., 193 Miss. 317, 7 So. (2d) 811; and further observed that:

"It has often been observed in times past that interstate commerce should pay its way, should be made to bear a fair share of the cost of local government whose protection it enjoys, but outside of ad valorem taxes and until recently most efforts to make it pay its way have met with failure. In late years, however, there is a tendency to uphold local taxation when it does not bear directly upon interstate commerce as commerce, or when indirect, it had no substantial effect to block or impede the free flow of such commerce.

"And more recently there has been a pronounced trend that, in order to make a more reasonable accommodation between local needs and the dominant requirement of freedom in the national commerce, recognition shall be given to a rule as follows: That although a particular activity may be essential to the continued full and unimpeded flow of commerce between the states as regards a particular commodity or other matter of such commerce, yet if that activity is of a substantial character, and is one which actually and distinctly happens in the particular State and must be, and is, protected by that State regardless of the ultimate purpose of the activities, then for the purpose of laying a tax as a recompense for the local protection afforded, the State may detach the activity so long as the exaction on account of it is not made a pretext to impose a burden which would have the effect, beyond that which is remote or unsubstantial, to interfere with the national interests."

The fact that the imposition of a state tax adds to the cost of interstate commerce is not alone sufficient to invalidate the tax as an interference with that commerce. 51 Am. Jur., Sections 203, 207, pp. 264, 270, citing McGoldrick *v.* Berwind-White Coal Mining Co., supra, and other cases among which is the case of Cloverdale *v.* Arkansas-Louisiana Pipe Line Co., 303 U. S. 604, 82 L. Ed. 153.

In the case of Dunston *v.* City of Norfolk, 15 S. E. (2d) 86 (Va.), the Court said:

"Finally, the Supreme Court of the United States has declined to deny to the States the right to levy a tax upon interstate commerce merely because it is such commerce. The latest cases recognize and admit the right of the States to require such commerce to bear its fair share of the cost of local government, notwithstanding the fact that the exer-

cise of such right may, in some measure, affect the commerce or increase the cost of doing business. They declare that the purpose of the commerce clause is to allow interstate commerce to compete on a fair and equal basis with local commerce. * * *

"The change of interpretation thus evidenced was more fully enlarged and amplified, in 1940, in the three cases of McGoldrick *v.* Berwind-White Coal Mining Company, 309 U. S. 33, 60 S. Ct. 388, 84 L. Ed. 565, 128 A. L. R. 876; and McGoldrick *v.* Felt & Tarrant Manufacturing Company and McGoldrick *v.* Du Grenier, Inc., 309 U. S. 70, 60 S. Ct. 404, 84 L. Ed. 584, sometimes referred to as the New York City Sales Tax Cases."

The general rule is announced in 51 Am. Jur., Sec. 204, p. 264, that "the commerce clause of the Federal Constitution affords immunity to property from local taxation when, but only when, it is in transit as interstate or foreign commerce", citing Champlain Realty Co. *v.* Brattleboro, 260 U. S. 366, 67 L. Ed. 309, and numerous other cases. But here the tax is not on any property in transit as interstate commerce or otherwise, but is merely on the privilege of operating a pipe line wholly within this State as a local activity. It is not on the owner or shipper of the oil. Nor is it a direct tax on the gross receipts from either the activity of the pipe line company or the interstate transportation by the railroad company, but rather a tax on the privilege of doing an intrastate business, and measured by a per cent of gross income as a matter of convenience. It only indirectly affects the commerce.

Moreover, the tax would be equally applicable to a domestic or foreign corporation engaged in such activity or in transporting oil by pipe line from tanks on producing leases to an oil refinery, should there be one in the State, whether the oil was ultimately transported in interstate commerce or not, and therefore the taxing statute in no manner discriminates against interstate commerce, and it only incidentally and indirectly affects the same.

In McGoldrick *v.* Berwind-White Coal Mining Co., supra, the Court said: "Forms of state taxation whose tendency is to prohibit the commerce or place it at a disadvantage as compared or in competition with intrastate commerce

and any state tax which discriminates against the commerce, are familiar examples of the exercise of state taxing power in an unconstitutional manner, because of its obvious regulatory effect upon commerce between the states. But it was not the purpose of the commerce clause to relieve those engaged in interstate commerce of their just share of state tax burdens, merely because an incidental or consequential effect of the tax is an increase in the cost of doing the business * * *. Not all state taxation is to be condemned because, in some manner, it has an effect upon commerce between the states, and there are many forms of tax whose burdens, when distributed through the play of economic forces, affect interstate commerce, which nevertheless falls far short of the regulation of the commerce which the Constitution leaves to Congress."

We quoted the above language with approval in Stone *v.* General Electric Contracts Corp., 193 Miss. 317, 7 So. (2d) 811. In that case we also cited State of Wisconsin *v.* J. C. Penney, 311 U. S. 435, 85 L. Ed. 267, wherein it was said: "A state is free to pursue its own fiscal policies, unembarrassed by the Constitution, if by the practical operation of a tax the state has exerted its power in relation to opportunities which it has given, to protection which it has afforded, to benefits which it has conferred by the fact of being an orderly, civilized society."

We are of the opinion that the case of Carson Petroleum Co. *v.* Vial, 279 U. S. 95, 73 L. Ed. 626, and other similar cases such as those reviewed in the annotation contained in 171 A. L. R. at page 283, et seq., and some of which are relied upon by the appellant, are to be distinguished from the instant case in that they involve only the question of whether or not a property tax—for ad valorem purposes—could be imposed upon a commodity which is temporarily interrupted in transit for a change in the mode of transportation and where the same does not remain in the taxing state long enough to acquire a situs therein for ad valorem taxation purposes. They do not involve the right of the State to exact a tax upon the *privilege of engaging in the local activity* of rendering services wholly within the taxing state for hire, such as operating pumping machinery and

pipe lines for the transportation of commodities from one point to another in the State.

Moreover, in the Carson Petroleum Company case, supra, the oil was purchased outside of Louisiana, shipped into that state to a storage place and was awaiting the arrival of ships for its transportation to foreign countries. There was no question about the property being in transportation in interstate commerce and the ad valorem tax sought to be assessed was against the owner of the oil where the same remained at the storage place only long enough for a change in the mode of transportation, and for an insufficient time to acquire a situs in Louisiana for ad valorem taxation purposes.

The Court decisions, state and federal, cited both on behalf of the taxpayer and the Tax Commission are too numerous for discussion and analysis in an opinion of justifiable length, but we think that when each of them are viewed in the light of their particular facts it will be found that the more recent cases sustain the view that the commerce clause of the Federal Constitution does not deny to the State the right to tax the privilege of engaging in a local activity such as is here involved.

The decision of the trial court will, therefore, be affirmed wherein it upheld the tax collected for operating the pipe lines in question and reversed wherein it upheld the Use tax on the use of tthe property employed in the operation of said pipe line business, and a judgment here will be entered accordingly.

Affirmed in part, reversed in part and judgment accordingly.

Alexander, J. took no part in this decision.

IN THE SUPREME COURT OF MISSISSIPPI

No. 36,672

(Opinion Rendered April 26, 1948)

In Banc:

INTERSTATE OIL PIPE LINE CO.

vs.

A. H. STONE, Chairman State Tax Commission

GRIFFITH, *J.*, dissenting in part:

Under the precise facts as disclosed by this record I am of the opinion that all the activities here in question were interstate in character and that none of the tax here sought to be imposed could be lawfully collected. The authorities which support that view will appear in the reporter's abstracts and will not be further referred to here.

Smith, L. A. Sr., J., concurs in this dissent.

IN THE SUPREME COURT OF MISSISSIPPI

No. 36,672

(Opinion Rendered June 14, 1948)

In Banc:

INTERSTATE OIL PIPE LINE COMPANY

vs.

A. H. STONE, Chairman State Tax Commission

ROBERDS, *J.*:

On Suggestion of Error

Each party to this appeal has filed a Suggestion of Error. Appellant contends we were in error in affirming the

lower court in its disallowance to appellant of a refund of $20,296.36 collected by the Chairman of the State Tax Commission for appellant's privilege in operating pipe lines in Mississippi through which it transported oil from one point to another in this State. Sections 10105 and 10109, Code 1942. We have reexamined the questions, but find no reasons impelling a change in, or reversal of, that opinion.

Appellee suggests that we erred in allowing to appellant a refund of Use Taxes amounting to $5,030.27. That holding was based, first, on the ground that the property operated by appellant in transporting oil was used "* * * in the furtherance of interstate transportation, or interstate commerce * * *"; and, second, on the further ground that such property was "* * * not procurable in the ordinary channels of trade in the State of Mississippi", both of which exceptions are set out in Section 10149, Code 1942. The facts underlying the second ground were not fully developed in the record, but we thought enough appeared to justify our holding in the absence of citation of any authority to the contrary. However, the Suggestion of Error has called to our attention the cases of Peoples Gas & Electric Company *v.* State Tax Commission of Iowa, 28 N. W. (2d) 799, and General Trading Company *v.* State Tax Commission of Iowa, 322 U. S., 335, 88 L. Ed. 1309, apparently holding otherwise. A decision on this point was not necessary to the result reached by us; it was sufficient that the property was being used in furtherance of interstate transportation or commerce. We, therefore, withdraw all that was said in the original opinion in Paragraphs Eleven, Twelve and Thirteen thereof, and we let non-liability for the Use Tax rest solely on the stated ground that the property was being used in furtherance of interstate transportation or interstate commerce.

Both suggestions of error are overruled.

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SUPREME COURT, U.S.

No. 287

In the Supreme Court of the United States

October Term, 1948.

INTERSTATE OIL PIPE LINE COMPANY,
Appellant,
vs.
A. H. STONE, CHAIRMAN STATE TAX COMMISSION.

Appeal from the Supreme Court of the State of Mississippi.

BRIEF of APPELLANT.

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CITATION OF OPINION IN COURT BELOW.

Interstate Oil Pipe Line Company v. Stone, 35 So. (2d) 73 (1948).

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1948.

No. 287

INTERSTATE OIL PIPE LINE COMPANY,
Appellant,
vs.
A. H. STONE, CHAIRMAN STATE TAX COMMISSION.

BRIEF *for* APPELLANT.

Statement of Jurisdiction.

Section 237 (a) of the Judicial Code, as amended (36 Stat. 1156, 43 Stat. 937, 45 Stat. 54, 28 U. S. C. A. 344 (a)), is believed to sustain the jurisdiction of this Court.

The invalidity of the Mississippi statute, as applied, because of its repugnancy to the Commerce Clause of the Constitution of the United States, was raised at the beginning of and has been urged throughout all the proceedings in the state courts.

In its declaration filed in the trial court for recovery of the tax paid under protest, appellant alleged the facts concerning the business conducted by it and that the taxes are "in violation of the Commerce Clause of the Constitution of the United States, Article I, Section 8, Clause 3" (Par. XIII, Transcript of Record, page 6), and that "if

the said General Sales Tax Law" is "applicable to plaintiff in the levy of the said sales taxes and use taxes, the said laws are void and of no effect because" they impose a license on interstate commerce, place a burden on plaintiff's privilege of carrying on interstate commerce, constitute a direct burden on the transportation of crude oil exclusively in interstate commerce, constitute a tax directly on interstate commerce or the privilege of engaging therein, are an attempted regulation of interstate commerce, and attempt to usurp the powers delegated to Congress by the Constitution of the United States. (Par. XIV, Tr. 7). Defendants' pleading denied these allegations (Pars. XIII, XIV, Tr. 27). The trial court rendered judgment against appellant.

On appeal to the Supreme Court of Mississippi, an assignment of error was (Tr. 43):

> "That if the General Sales Tax Law" * * * (is) "applicable to appellant's activities as set out in this suit, then said laws are void and of no effect by reason of the fact that they are in conflict with Article I, Section 8, Clause 3, of the Constitution of the United States, known as the Commerce Clause."

In its opinion of April 26, 1948, the Supreme Court of Mississippi said as to these taxes (Tr. 45), 35 So. (2d) 74:

> "The liability therefor is contested by the pipe line company on two grounds: * * * (2) that the taxpayer's transportation of the oil was in interstate commerce, and that, therefore, the imposition of both of the taxes here in question violates the commerce clause of the Constitution of the United States * * *."

That court held that appellant's transportation of crude oil was a local activity, did not constitute interstate commerce and that the tax on the revenues received by appellant for such transportation was properly collected. In so holding, the court of necessity passed on the federal consti-

tutional question raised by the appellant, and sustained the validity of the state statute as applied to appellant's business activities.

Where a federal right is concerned, the state court's characterization of the tax is not conclusive and does not relieve the Federal Court of the duty of considering the real nature of the tax and its effect upon the federal right asserted. *United States* v. *Allegheny County*, 322 U. S. 174; *Reconstruction Finance Corp.* v. *Beaver County, Pennsylvania*, 328 U. S. 204; *Richfield Oil Corp.* v. *State Board of Equalization*, 329 U. S. 69.

Appeal is the proper method of reviewing a state court judgment which upholds a state tax statute over objection that the statute, as applied, imposes an unconstitutional tax upon interstate commerce, although the state court, in upholding the statute as so applied, construes the statute as applying only to intrastate commerce, as it defined it. *Eureka Pipe Line Co.* v. *Hallanan*, 257 U. S. 265; *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282.

This Court noted probable jurisdiction of this case on October 18, 1948.

Statement of the Case.

A. *The Question.*

This is an appeal from a judgment of the Supreme Court of the State of Mississipi rendered April 26, 1948, and affirmed by overruling Suggestion of Error on June 14, 1948, wherein the appellant, Interstate Oil Pipe Line Company, a common carrier, was denied the right to recover from A. H. Stone, chairman of the State Tax Commission of Mississippi, privilege tax in the amount of $20,296.36 for the years 1944 and 1945 and for the period from January 1 to June 30, 1946, which appellant paid under protest and

brought this suit to recover, with interest and costs. Although contained in the sales tax section of the Mississippi Code, the tax is in fact a privilege tax and has been so designated by the Mississippi Supreme Court in its decision in this case. It is a privilege tax on account of business engaged in, computed, in this case, at 2% of gross income from the business of operating a pipe line. The gross income upon which the tax in dispute was collected was derived from transporting oil by pipe line from one point in Mississippi to another and there loading it aboard tank cars for shipment to destinations outside the state. It was appellant's contention in the Mississippi Supreme Court that said tax was not due by reason of the fact that it was imposed on the gross receipts derived from interstate commerce which are specifically exempt under the provisions of the Mississippi Sales Tax Law and which the State of Mississippi is prohibited from taxing by the provisions of Article I, Section 8, Clause 3, of the Constitution of the United States, and that the Mississippi statute as applied in this case was unconstitutional and void. The Mississippi Supreme Court upheld the tax on the grounds that the commerce conducted by the appellant which is here in question was in fact *intrastate* commerce. It did not find that the gross receipts from interstate commerce were taxable under the act nor that the state had the power to levy such a tax on interstate commerce under the "Commerce Clause" of the United States Constitution.

The question at issue before this Court is whether or not by so defining the activities of this appellant as *intrastate* commerce, the Mississippi Supreme Court has in fact upheld a tax on *interstate* commerce which the State of Mississippi is prohibited from levying by the provisions of Article I, Section 8, Clause 3, of the Constitution of the

United States. This question resolves itself into two points of consideration which will be taken up and discussed in order in this brief:

(1) Is the transportation here at issue interstate or intrastate in character?

(2) If the transportation is interstate, is a state privilege tax based on the gross receipts therefrom prohibited by the provisions of Article I, Section 8, Clause 3, of the Constitution of the United States?

B. *The Facts.*

There is no dispute as to the facts in this case which were stipulated in an Agreed Statement of Facts executed on behalf of counsel for both parties and filed in the record of this proceeding in the trial court. (See Tr. 29.) For the convenience of the Court the following is a brief summary of the more important facts pertinent to this controversy:

Plaintiff, Interstate Oil Pipe Line Company, is a Delaware corporation duly qualified to do business as a foreign corporation in the State of Mississippi. The company has paid for each of the years involved in this action substantial amounts of franchise and income taxes to the State of Mississippi and has paid *ad valorem* taxes on its properties. It is engaged in Mississippi solely in the business of transporting crude petroleum as a common carrier for various shippers for hire and does not own any of the oil so transported. During the period from January 1, 1944, to June 30, 1946, inclusive, plaintiff constructed and operated pipe line gathering systems for the transportation of oil from lease tanks situated at or near oil wells in various fields in Mississippi to loading racks located adjacent to railroads from which plaintiff loaded the oil into railroad tank cars for shipment to destinations outside the State of Mississippi. Plaintiff is an interstate carrier operating under the juris-

diction of the Interstate Commerce Commission and all of its transportation of oil in Mississippi is covered by tariffs which are regularly published and filed with the Interstate Commerce Commission. The regulations of said tariffs provide that the company will receive crude petroleum as therein defined from lease tankage within the area of its gathering system, for transportation to destinations named therein, for *interstate transportation beyond* under terms and conditions set out therein. All oil which is gathered and loaded aboard tank cars is tendered for shipment by the owners of the oil at the lease tanks in the producing fields prior to the movement of the oil. The shipper furnishes the company a "tender of shipment" form for each shipment which specifies the quantity of oil to be moved, the origin and ultimate out-of-state destination and the tariff under which the shipment is made. It also contains shipping instructions as to consignee, route of shipment, etc. After receipt of the "tender of shipment" form covering a particular shipment the oil is gauged in the specified lease tanks by representatives of the shipper and the company and the quantity of oil to be shipped is then pumped out of the lease tanks through the company's pipe lines to the tank-car loading rack, or, if tank cars have not been spotted, to the working tanks adjoining the loading racks to facilitate handling until the cars for the railroad shipment have been spotted on the sidetracks, usually a matter of only a few days and never more than a week. The oil is then pumped into the tank cars and the company procures a bill of lading for the shipment in accordance with directions contained in the "tender of shipment" form previously furnished, showing consignor of the oil as shipper and the company as agent of the shipper and setting out the out-of-state destination previously specified by the shipper. For its services in gathering the crude oil, transporting it from

the lease tanks in the producing fields to the railroad and loading it aboard tank cars the company is paid by the shipper at the rate per barrel stipulated in its applicable Interstate Commerce Commission tariff. In some cases interstate trunk pipe lines are constructed into areas from which the oil was previously shipped by tank car and in such cases the railroad loading racks are abandoned and the gathering line system from the wells is connected to the interstate trunk line and thenceforth the oil is pumped to destinations outside the state exclusively by pipe line. Defendant concedes that the transportation of oil from the producing wells to destinations outside the state solely through the medium of plaintiff's pipe line system is exempt from the Mississippi privilege tax. However, defendant contends that where plaintiff's gathering line systems are connected to railroad loading racks instead of to its own interstate trunk pipe lines and the oil is transported by plaintiff from the wells to the railroad and loaded into cars and shipped by rail to out-of-state destinations, the movements from the wells to the railroads are intrastate commerce and that the Mississippi privilege tax applies. The Tax Commission sustained this contention and plaintiff paid the tax assessed under protest and brought suit for refund in the Circuit Court for the First District of Hinds County, Mississippi. From a decision of that court in favor of defendant, plaintiff appealed to the Mississipi Supreme Court. The Mississippi Supreme Court sustained the lower court by 3 to 2 decision with two justices (Tr. 58) holding appellant's activities were exempt from tax by reason of being "interstate in character." From that decision appellant brings this appeal under Section 237 (a) of the Judicial Code.

C. *The Constitutional and Statutory Provis* s.

The appellant contends that the Mississippi statute as applied in this case is unconstitutional and void under the

provisions of Article I, Section 8, Clause 3, of the Constitution of the United States which is in pertinent part as follows:

> "The Congress shall have power * * * to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; * * *."

The Statutes of the State of Mississippi, the validity of which are drawn in question by virtue of the fact that the Supreme Court of Mississippi has construed them as applying to the particular operations of appellant here in controversy, are contained in Sections 10,105 and 10,109, Title 40, Chapter 3, Volume 7 of the 1942 Code of Mississippi, as amended, and are in pertinent part as follows:

> *10,105.* There is hereby levied and shall be collected annual privilege taxes, measured by the amount or volume of business done, against the persons, on account of the business activities, and in the amounts to be determined by the application of rates against values, or gross income, or gross proceeds of sales, as the case may be, as follows (see sections following).
>
> *10,109:* * * * Upon every person engaging or continuing within this state in the business of operating a pipe line for transporting for compensation or hire from one point to another in this state oil or natural gas or artificial gas through pipes or conduits in this state, there is likewise hereby levied and shall be collected a tax, on account of the business engaged in, equal to two per cent of the gross income of the business. * * *
>
> There shall be excepted from the gross income used in determining the measure of the tax imposed in this section so much thereof as is derived from the business conducted in commerce between this state and other states of the United States, or between this state and foreign countries which the State of Mississippi is prohibited from taxing under the Constitution of the United States of America * * *.

Assigned Errors of Lower Court.

Appellant respectfully maintains that the Supreme Court of the State of Mississippi in its decision of this case erred in the following respects:

(1) The said court erred in not holding that appellant's transportation of crude oil by pipe line constituted interstate commerce, and

(2) The said court erred in not holding invalid as applied the statute of Mississippi imposing a tax of 2% of the gross receipts of the appellant's business of transporting crude oil by pipe line for hire for the reason that said statute as applied is repugnant to Article I, Section 8, Clause 3 of the Constitution of the United States, known as the Commerce Clause.

ARGUMENT.

The argument of appellant will be presented under two main headings in answer to the two main considerations inherent in the question before the Court as set out above. The argument will seek to prove:

A. Appellant's operations as a common carrier in gathering and transporting by pipe line and in loading oil aboard tank cars for shipment by railroad to destinations outside the State of Mississippi are part of the interstate transportation of said oil and are in interstate commerce, and,

B. The state does not have the authority to levy a tax on the privilege of carrying on interstate commerce measured by the gross receipts derived by the appellant, a common carrier, from said interstate commerce.

A.

Appellant's Operations as a Common Carrier in Gathering and Transporting Oil by Pipe Line and in Loading Said Oil Aboard Tank Cars for Shipment by Railroad to Destinations Outside the State of Mississippi Are Parts of the Interstate Transportation of Said Oil and Are in Interstate Commerce.

The first point for consideration in deciding the question involved in this case is whether or not under the agreed statement of facts herein the activities of the appellant are interstate commerce within the meaning of the Commerce Clause.

There have been a multitude of cases in both the Federal and state courts attempting a definition of "interstate commerce."

At first glance the opinions in these cases might seem confusing. The courts in some cases have seemed to stretch the definition to extend the regulatory power of the Federal Government and in other cases to contract the definition to allow the states as much latitude as possible in their taxation. Each case, concerned with its own particular facts, has set up its own test of what constitutes interstate commerce. The key to this apparent confusion lies in Mr. Justice FRANKFURTER's statement in the recent case of *Freeman* v. *Hewit*, 329 U. S. 249, 252:

> "Suffice it to say that especially in this field opinions must be read in the setting of the particular cases and as the product of preoccupation with their special facts."

Looking only at the cases that have been decided by this Court on the question of interstate commerce in connection with the power of the state to tax, we can evolve a number of definite tests as to what constitutes interstate commerce. No one case has set out all these tests, but all

the tests the courts have set up are encompassed in one or another of these categories. These tests are as follows:

1. There must be movement across a state line.
2. There must be continuity of movement between the operation in question and the operation of crossing the state line.
3. The essential character of the operation as shown by intent and all surrounding factors must make it an integral part of the interstate shipment.

Ruling Case Law, Volume 5, Commerce, Section 24, comes as close to summarizing the tests as to what constitutes interstate commerce as any reference found. There the following language is used:

> "A carrier, though operating a line wholly within a state, is engaged in interstate commerce when it forms a link in a continuous transportation from one state to another and when the ultimate destination is some point in another state, to be reached on a continuous journey, a shipment from one point to another within the same state is interstate commerce, although a bill of lading is given for the interstate part and limits the liability of the carrier on delivery to the connecting carrier, that is, whether the goods are carried upon through bills of lading or are rebilled by the several railroads."

Authority for these principles of law is fully established in the cases cited and discussed in detail hereinafter. We will show that the case at bar meets all the tests for interstate commerce.

1. ***The oil involved in this shipment moves across a state line.***

There can, of course, be no interstate commerce without movement across a state line. There has never been

any question or dispute in this case as to whether or not the oil moved by appellant was ultimately transported out of the State of Mississippi. In the original agreed stipulation of facts filed in the trial court, the attorneys for both parties agreed as follows (Tr. 32):

> "All the oil gathered, transported and loaded aboard tank cars with respect to which sales and use taxes were paid, recovery of which is sought herein, was consigned for shipment to destinations outside the state and was in fact transported by the railroads from points of loading to destinations outside the State of Mississippi in continuous interstate commerce."

In its opinion in the case, the Supreme Court of Mississippi has stated 35 So. (2d) 73, 77 (Tr. 50):

> "* * * it was known that all of the oil transported by pipe line from producing leases or elsewhere would be transported to destinations outside the state either by interstate trunk pipe lines, on a continuous journey, or likewise by railroad from local shipping points within the state * * *. Most assuredly, no pipe line company would be deemed justified in installing an oil gathering system to transport oil other than that destined for ultimate interstate shipment, there being no oil refineries here."

The question to be answered then in determining whether the operations herein were interstate commerce is whether or not they had the proper relation with the railroad movement to constitute them a part of the acknowledged interstate movement by the railroad.

2. There is continuity of movement between the shipment by the pipe line and the shipment by the railroad thus linking the appellant's movement into interstate commerce.

The second test in determining whether or not a ship-

ment is interstate commerce is the continuity between the movement in question and the movement across the state line. Perhaps the best way to establish the continuity in the present case is to take a factual situation where all parties are agreed there is continuity and where there is no question but that the operation is interstate commerce and then compare the facts in that case with the facts in the case at issue. Appellee has conceded throughout this case and the Supreme Court of Mississippi has stated in its opinion (35 So. (2d) 73, 77) that where the appellant gathers the oil and then ships it out of the state *via* its trunk lines:

> "* * * it would of course constitute that character of commerce 'which the State of Mississippi is prohibited from taxing under the Constitution of the United States,' and this would be equally true as to the movement by rail of oil from a local shipping point to its destination outside the state in crossing the state line." (Tr. 50)

The all-pipe line shipment admittedly then is a situation where there is continuity between the gathering operations and the shipment out of the state. In the present case the appellant gathers the oil, loads it aboard tank cars, and the railroad then ships it out of the state. The appellee contends and the Mississippi Supreme Court sustains the contention that the gathering operations are not part of interstate commerce, but are simply in preparation for the interstate movement. We shall examine the distinguishing points between the situation where there is admittedly continuity and that where appellee claims there is none and determine whether singly or in combination any of these factual distinctions break the continuity. The distinguishing points may be itemized as follows:

a. In the present case there is movement by two carriers rather than one.

b. The mode of transportation in the present case is changed from pipe line to railroad.

c. The transportation by the appellant in the present case is entirely within Mississippi.

d. There are separate charges and no through bill of lading in the present instance.

e. There is temporary stoppage of the shipment in the present case, while the oil is transferred from one type of conveyance to another.

We shall endeavor to show point by point that none of these facts change the character of the movement or destroy the continuity and, therefore, that the one situation is just as much interstate commerce as the other.

***a.* Shipment by two or more carriers does not break the continuity:**

This Court when confronted with the situation has always held and the principle is well established that two or more carriers may share in the interstate movement of goods with only one actually crossing the state line and yet all be considered as engaging in interstate commerce. In fact, so far as we have been able to determine, no serious contention has ever been made that mere handling of goods by two or more carriers affects the nature of the shipment. There are an almost endless number of cases, however, which hold interstate commerce to exist where two or more carriers are involved. See *The Daniel Ball* v. *United States*, 77 U. S. 557; *Norfolk & Western Ry. Co.* v. *Pennsylvania*, 136 U. S. 114.

This doctrine has been brought right down to date in its application to pipe lines by *Interstate Natural Gas Co.* v. *Federal Power Commission*, 331 U. S. 682, decided by this Court on June 16, 1947. There gas not oil was being

transported. The first carrier transported the gas from the producing wells through its gathering lines to main trunk lines and thence to a compressor station. At that point another carrier increased the pressure of the gas and moved it out of the state. Mr. Chief Justice Vinson, writing the opinion of the court, held that the entire movement of the gas from the wells to final destination was interstate commerce. (See quotation from this case, page 37.)

b. Shipment by two or more modes of transportation does not destroy the continuity:

This Court has also uniformly held that where two carriers are jointly engaged in moving a product, the continuity of movement is not broken by the fact that they may not be the same type of carrier. Thus in the *Daniel Ball* case, 77 U. S. 557, the carrier involved in the case was a boat which moved goods only between points in the same state, but the court in deciding that the boat was engaged in interstate commerce, since it carried property originating or destined beyond the state line, did not even bother to discuss whether the connecting carriers were railroads, stagecoaches, or other boats. The clear and only inference is that it did not matter. Many more recent cases have involved facts where there was a definite change in mode of transportation: There is a change in mode of conveyance from railroad to ship in *Railroad Commission* v. *Texas & Pacific Railway Company*, 229 U. S. 336. There is a change from handling by a stevedoring company to movement by ship in *Puget Sound Stevedoring Co.* v. *Tax Commissioner of State of Washington*, 302 U. S. 90, and in the more recent case of *Joseph* v. *Carter & Weekes Stevedoring Company*, 330 U. S. 422. There is a change from railroad to motor cab and back to railroad in the recent case of *United States* v. *Yellow Cab*, 332 U. S. 218. A case involving two modes of

transportation where one of the carriers is a pipe line is *Clark v. Atlantic Pipe Line Company*, 134 S. W. (2d) 322. There a pipe line company originated the movement and then transferred the oil to ocean tankers. Additional cases could be cited *ad infinitum*, but we believe the point is so well established and generally accepted that further citations would only be repetitious.

c. Movement entirely within a state may have continuity with a movement beyond state lines and thereby be part of interstate commerce:

The doctrine is also well established that operations entirely in one state may be interstate commerce. In 11 American Jurisprudence, Commerce, Paragraph 65, the rule is stated thus:

> "An agency operating entirely within the limits of a state may nevertheless be engaged in interstate or foreign commerce. Thus, when the ultimate destination is some point in another state, to be reached by a continuous journey, a shipment or transportation from one point to another within the same state is interstate commerce; and where there was an intention to make a through shipment to the point of final destination, a similar rule is usually held to prevail with respect to a shipment of goods from another state over a connecting line entirely within the state, irrespective of whether there was a common arrangement between the carriers. The interstate character of a through shipment is not affected by limitations on the liability of the several carriers to their own lines or by the fact that goods consigned to a point outside a state are delivered before the state line is reached."

The *Daniel Ball* case, decided in 1871 and previously cited herein, is one of the leading cases on this point. The Daniel Ball was a steam vessel plying the Grand River in

Michigan between the cities of Grand Rapids and Grand Haven and transporting merchandise between those points. Part of this merchandise had come into Michigan from out of the state and part was destined for ports and places beyond the state line. Mr. Justice FIELD in writing the opinion for the United States Supreme Court said of the Daniel Ball, 77 U. S. 557, 565:

> "So far as she was employed in transporting goods destined for other states, or goods brought from without the limits of Michigan and destined to places within that state, she was engaged in commerce between the states, and however limited that commerce may have been, she was, so far as it went, subject to the legislation of Congress. She was employed as an instrument of that commerce; for whenever a commodity has begun to move as an article of trade from one state to another, commerce in that commodity between the states has commenced. The fact that several different and independent agencies are employed in transporting the commodity, some acting entirely in one state, and some acting through two or more states, does in no respect affect the character of the transaction."

The *Daniel Ball* has been cited with approval again and again.

See also *United States* v. *Colorado & N. W. R. Co.*, (C. C. A. 8) 157 Fed. 321, 15 L. R. A. (NS) 167, where the company, to use the language of the court, 157 Fed. 323, was:

> "a common carrier which operates a railroad [narrow gauge] entirely within a single state, and transports thereon articles of commerce shipped in continuous passages from places without the state to stations on its road, or from stations on its road to points without the state, free from any common control, management, or arrangement with another carrier for a continuous carriage or shipment thereof, * * *."

All goods have to be transferred from broad gauge lines

to this narrow gauge road. The Eighth Circuit Court held it to be in interstate commerce and certiorari was denied by the United States Supreme Court in 209 U. S. 544.

The same doctrine has frequently been applied to pipe line operations entirely within a state. *Peoples Natural Gas Co.* v. *Public Service Commission*, 270 U. S. 550; *Clark* v. *Atlantic Pipe Line Co.*, 134 S. W. (2d) 322.

The doctrine has been brought right down to date by this Court in *United States* v. *Yellow Cab Co., et al.*, 332 U. S. 218, decided on June 23, 1947. There one of the defendants, Parmelee Transportation Company, was operating special unlicensed cabs to transport passengers and their luggage between railroad stations in Chicago, pursuant to exclusive contracts with the railroads and railroad terminal associations. Mr. Justice MURPHY in the opinion of this Court states, at page 228:

> "The transportation of such passengers and their luggage between stations in Chicago is clearly a part of the stream of interstate commerce. When persons or goods move from a point of origin in one state to a point of destination in another, the fact that a part of that journey consists of transportation by an independent agency solely within the boundaries of one state does not make that portion of the trip any less interstate in character. *The Daniel Ball*, 10 Wall. 557, 565, 19 L. ed. 999, 1002. That portion must be viewed in its relation to the entire journey rather than in isolation. So viewed it is an integral step in the interstate movement."

The Doctrine was also applied to pipe lines in the last term of this Court in *Interstate Natural Gas Co.* v. *Federal Power Comm.*, 331 U. S. 682.

See also *Southern Pacific Terminal Co.* v. *Interstate*

Commerce Commission, 219 U. S. 498; *Jersey Central Power & Light Company* v. *Federal Power Commission*, 319 U. S. 61; *Puget Sound Stevedoring Company* v. *Tax Comm. of State of Washington*, 302 U. S. 90; *Joseph* v. *Carter & Weekes Stevedoring Co.*, 330 U. S. 422; *Houston Direct Navigation Co.* v. *Insurance Co. of North America*, 89 Tex. 1, 32 S. W. 889, 30 L. R. A. 713.

***d.* Local bills of lading and separate charges do not affect the continuity of the movement:**

The fact that there is no through bill of lading and that the appellant's charge for its services is made separately from the railroad's charge is immaterial and does not break the continuity. Such things have been held to be some evidence of intent but here the intent has been clearly established otherwise. Except as evidence of intent the local bill of lading is purely a matter of form which the courts will look through to the substance. *Superior Oil Company* v. *State of Mississippi*, 280 U. S. 390. In fact if it had been thought necessary under the facts in the case at bar to have a through bill of lading to back up the clear intent that the oil was to be shipped out of the state, the appellant, under the Interstate Commerce Act has the authority and could arrange for such handling. It has not been done because it would be more cumbersome for the pipe line company to issue joint tariffs with the railroads for transportation to all possible out of state rail destinations.

American Jurisprudence clearly states the rule of law on this point in Volume 11, Commerce, Paragraph 64:

> "It is the general rule that the form of the bill of lading or contract of carriage, although evidentiary, is not conclusive as to the character of the transportation, and where commodities are in fact destined from

one state to another, a rebilling or reshipment en route does not of itself break the continuity of the movement or require that any part be classified differently from the remainder."

Again in 11 American Jurisprudence, Commerce, Paragraph 71:

"Nor do formalities such as the forms of billing and mere changes in the methods of transportation affect the continuity of the transit as regards its interstate character."

One of the leading cases on this question is *Railroad Commission* v. *Texas & Pacific Railroad Company*, 229 U. S. 336. There the Louisiana Railroad Commission had issued orders which the railroad wished to void on the grounds that it was engaged in interstate commerce. The shipments there in question were under local bills of lading providing for the shipment of freight from points in Louisiana to New Orleans where the goods were delivered to the shipper's or consignee's order. The articles shipped were intended by the shippers to be exported to foreign countries. The shippers held the cars on the railroad track until sufficient cargo was accumulated to fill export orders and until arrangements could be made for transportation. This Court in finding that the shipments were in interstate commerce, held as follows, 229 U. S. 341:

"The principle enunciated in the cases were that it is the essential character of the commerce, not the accident of local or through bills of lading, which determines federal or state control over it. And it takes character as interstate or foreign commerce when it is actually started in the course of transportation to another state or to a foreign country. The facts of the case at bar bring it within the ruling. The staves and logs were intended by the shippers to be exported to foreign countries, and there was no interruption of

their transportation to their destination except what was necessary for transshipment at New Orleans."

Another case early establishing this doctrine was that of *Baer Bros. Mercantile Co.* v. *Denver & Rio Grande R. Co.*, 233 U. S. 479, where it was held that a carrier could not, by separating the rate into its component parts, charging local rates, and issuing local waybills, convert an interstate shipment into one in intrastate commerce, thereby depriving the shipper of the interstate rate.

In *Illinois Central R. Co.* v. *De Fuentes*, 236 U. S. 157, the Louisiana Railroad Commission attempted to regulate the switching operations of the railroad. It was admitted that the railroad published "terminal tariffs covering switching" and that charges therefor were separately rendered. But this Court, in finding the switching was interstate commerce, held, page 163:

> "When freight actually starts in the course of transportation from one state to another it becomes a part of interstate commerce. The essential nature of the movement, and not the form of the bill of lading, determines the character of the commerce involved. And generally when this interstate character has been acquired it continues, at least, until the load reaches the point where the parties originally intended that the movement should finally end."

This doctrine has been applied to pipe lines in *Clark* v. *Atlantic Pipe Line Co.*, 134 S. W. (2d) 322. There the pipe line company gathered oil from various fields in Texas and transported it to points on the Gulf Coast. It had separate charges for gathering and trunk line operations and its "bill of lading" or tender of shipment covered transportation entirely within the State of Texas. At the coast this oil was temporarily stored until shipping was available and

the right amount of the right kind of oil was on hand. This usually involved a delay of from one to two weeks, then the oil was moved by steamship to other states and foreign countries. The state contended the pipe line business was intrastate on the grounds that the oil traveled under local bills of lading and that it was delayed in transit and stored pending the arrival of ships. The court said, pages 326-327, that these contentions of the state,

> "have been with such unanimity adversely adjudicated that only a brief statement of the effect of the holdings and citation of one or more supporting authorities is necessary * * *. 'The nature of a shipment is not affected by the fact that the transaction is initiated and completed under a local bill of lading which is wholly intrastate.'"

The rule was also applied in *Eureka Pipe Line Co.* v. *Hallanan*, 257 U. S. 265. There the pipe line company made one charge for gathering oil, made another charge for "storage" and then made a trunk line charge, usually in the form of a joint tariff, for shipment out of the state. Because of their system of charging, the state claimed the right to lay a tax of 2% per barrel on the oil gathered. This Court held the tax invalid as a burden on interstate commerce when applied to oil which eventually was transported out of the state. Mr. Justice HOLMES in the opinion wrote, page 272:

> "The charges for gathering and storage seem to us not to affect the case * * *. The oil runs into a tank on one side and out on the other. The tank may be regarded as a pipe of larger size * * *. As has been repeated many times, interstate commerce is a practical conception, and, as remarked by the court of first instance, a tax, to be valid, 'must not, in its practical effect and operation burden interstate commerce.' It appears to us as a practical matter that the transmis-

sion of this stream of oil was interstate commerce from the beginning of the flow * * *."

This doctrine that separate charges do not destroy the continuity necessary for interstate commerce was reiterated in *Puget Sound Stevedoring Co.* v. *Tax Comm. of the State of Washington*, 302 U. S. 90, and was brought down to date in *Joseph* v. *Carter & Weekes Stevedoring Co.*, 330 U. S. 422. In the latter case there was involved the validity of a gross receipts tax as applied to the business of stevedoring companies in loading and unloading vesels employed in interstate and foreign commerce. In his summation Mr. Justice REED said, page 433:

"Stevedoring, we conclude, is essentially a part of the commerce itself * * *."

In these stevedoring cases as in the case here at bar the activities of the company which the state sought to tax were completed entirely within the state, another company and a different type of carrier were involved in moving the goods out of the state, and the stevedoring company separately charged and was separately paid for its activities. The facts in the case at bar are stronger than those in these stevedoring cases in that (*1*) appellant is a common carrier under the regulation of the Interstate Commerce Commission, (*2*) there is actual transportation of the goods in our case prior to the loading operation.

It might be well to point out here that these stevedoring cases cannot be distinguished from the case at bar on the grounds that they are decided under rules of maritime law and that the federal government has always controlled maritime activities. As mentioned hereinbefore, the company in our case is subject to the control of the federal government through the Interstate Commerce Commission.

All pipe line activities since the amendment of the Interstate Commerce Act in 1906 have been just as much subject to federal regulation as has been maritime commerce. The Interstate Commerce Act, as amended June 29, 1906, and as set out in 49 U. S. C. A. 1, provides as follows:

> "(1) the provisions of this chapter shall apply to common carriers engaged in * * *,
>
> (b) the transportation of oil or other commodity, except water and except natural or artificial gas, by pipe line, or partly by pipe line and partly by railroad or by water."

We might also mention in passing that no logical contention can be made that the cases we have cited dealing with foreign commerce are distinguishable on that ground. In the *Carter & Weekes* case both foreign commerce and interstate commerce were involved. Mr. Justice REED wrote, 330 U. S. 425:

> "We do not find it necessary to consider separately interstate and foreign commerce. The Commerce Clause covers both."

On the point of local bills of lading see *Texas & N. O. R. Co.* v. *Sabine Tram Co.*, 227 U. S. 111; *Baltimore & Ohio S. W. R. Co.* v. *Settle*, 260 U. S. 166; *United States* v. *Erie R. Co.*, 280 U. S. 98; *Houston Direct Nav. Co.* v. *Insurance Co. of North America*, 32 S. W. 889.

The Supreme Court of Mississippi approved this doctrine in its opinion in this case. The court in 35 So. (2d) 73, 78 (Tr. 51), stated:

> "In other words, neither the form of contract nor method of billing is controlling on the question of whether the pipe line company was employed to do more than render a local service for the owner of the oil * * *."

e. Temporary stoppage of the shipment in the course of transportation does not destroy the continuity:

Our last point with respect to continuity is set out very well in 11 American Jurisprudence, Commerce, Paragraph 71, as follows:

> "On the other hand, an interstate movement which has begun may be regarded as continuing so as to maintain the immunity of the property from state regulation and taxation, despite temporary interruptions due to the necessities of the journey or for the purpose of safety and convenience in the course of the movement."

One of the most frequently cited cases on this point is *Carson Petroleum Company* v. *Vial*, 279 U. S. 95. In that case the company sought to avoid the levy of an *ad valorem* tax on oil in storage tanks on the grounds that said tax was an interference with interstate commerce. The company owned and operated a system of tanks and pumping equipment for receiving the contents of railroad oil tank cars, and thereafter loading the oil aboard ships for foreign commerce. The oil in each railroad tank car was not segregated or assigned or destined to any particular cargo or shipment aboard, but was pumped into a storage tank, which had the capacity of many tank cars, and was held there until a sufficient quantity of oil was accumulated to make up a cargo or until the arrival of a ship. The Court held in that case that the oil in storage was none the less in interstate commerce and hence not subject to the tax. Mr. Chief Justice TAFT in writing the opinion of the Court gave a very comprehensive review of the authorities on the continuity of transit. On the authority of these cases it was held that the storage was only incidental to the foreign commerce and that it was a necessary part thereof. The storage in that case was for the identical reason that there

is delay in transit in our case, *i. e.*, transfer of the oil from one carrier to another. The Court in the *Carson* case emphasizes the fact that there was and could be no local business at the point of storage. The same thing is even more true, if possible, in our case. The storage tanks and loading racks here are at isolated railroad sidings where nothing could possibly be done with the oil other than put it aboard railway tank cars. The duration of stoppage in our case was limited to the time required for the railroad to spot the tank cars for loading and was clearly an incident of its interstate shipment.

Among the authorities cited by the Court in the *Carson* case is the famous case of *Champlain Realty Company* v. *Brattleboro*, 260 U. S. 366, where logs were floated down river from one state to another and were detained at one point due to high water. It was held the interruption was only to promote the safe or convenient transit and did not break the continuity of the interstate journey. *Kelley* v. *Rhoads*, 188 U. S. 1. Another leading case is *Hughes Bros. Timber Co.* v. *Minnesota*, 272 U. S. 469. There, logs were floated down river to Lake Superior where they were held pending their shipment by vessel into Michigan. Again this Court held the delay was incident to the interstate movement and that the movement was continuous. In its decision the Court made one remark of particular interest in our case. In speaking of the floating of the logs down the stream by the owner, it said, page 475:

> "Solution is easy when the shipment has been delivered to a carrier for a destination in another state. It is much more difficult when the owner retains complete control of the transportation and can change his mind and divert the delivery from the intended interstate destination as in the *Champlain Company* case."

In the case at bar the oil has been delivered to a common carrier for delivery in another state. Thus, the Court distinguishes the facts of our case as a clearer case of continuous interstate movement than the *Champlain* or *Hughes Brothers* cases.

There are numerous cases of stoppage in transit by pipe line companies where interstate commerce has been held not to be affected. In *Eureka Pipe Line Co.* v. *Hallanan,* 257 U. S. 265, where the oil was stored in tanks at the terminus of the gathering system prior to pumping it through the trunk lines, the language of the court has already been quoted in this brief under our discussion of local bills of lading and local charges. The storage was held only incidental to the movement since it was only what was necessary and convenient in the shipment of the oil. In *State, ex rel. Hirschi* v. *Empire Oil & Refining Co.,* 171 Okl. 138, 42 P. (2d) 127, the company was engaged in transporting oil from points in Oklahoma to points outside the state. But it had storage tanks in Logan County, Oklahoma, where the oil was stored until sufficient oil of the same grade and substance was accumulated to make a batch for shipment. The county sought to assess a tax on the oil in storage on January 1, but the court sustained the defendant's contention that the oil was on *bona fide* consignment and was destined for transportation outside the state, and was, therefore, in interstate commerce. In *Clark* v. *Atlantic Pipe Line Co.,* 134 S. W. (2d) 322, the essential facts of which have been set out heretofore under our discussion of bills of lading, the court used the following language in setting aside the state's contention that the delay in transit and the storage in tanks at the terminals pending the arrival of ships broke the continuity of movement, page 327:

"The delays in transit and storage at the terminal

wharves were only incidental to the customary and essential method of transportation of oil by pipe line and did not break the 'continuity of transit' or affect the interstate character of the shipments."

The facts in this *Atlantic Pipe Line* case are identical to those in our case at bar, except that the transfer of oil is made to ships rather than to railroad cars. Surely that distinction is not material.

The following pipe line cases also support the view that stoppage in transit does not interrupt the interstate journey. *West Virginia Pipe Line Company* v. *State*, 120 S. E. 759; *Cumberland Pipe Line Company* v. *Sheriff of Estell County*, (Ky.) 79 S. W. (2d) 366.

See also, *Railroad Commission* v. *Worthington*, 225 U. S. 101; *Southern Pacific Terminal Company* v. *Interstate Commerce Commission*, 219 U. S. 498; *Railroad Commission* v. *Texas Pacific Railway Co.*, 229 U. S. 336.

The case of *Atlantic Coast Line Railroad Co.* v. *Standard Oil Co.*, 275 U. S. 257, can be readily distinguished from the case at bar. In that case the oil company maintained large storage facilities at two Florida ports where it received and took title to fuel oil imported from Mexico and to gasoline, refined oil and lubricating oil from Louisiana. These storage facilities served as source of supply for the company's 123 bulk stations located throughout the state, and a sufficient supply was kept in storage to supply the company's need for from 6 to 12 weeks. It was known at the time of shipment that the ultimate destination of the oil was not the storage facilities, but to quote from the language of the court, page 265:

"At the time the shipment of the fuel oil is made from the point or origin, plaintiff cannot say where

any particular cargo * * * will go after it has been pumped into the storage tanks, to whom it will go, or when it will be shipped * * * the only destinations which can be given are Port Tampa and Jacksonville, respectively."

The court, in holding that the shipment from the storage depots and bulk plants was intrastate commerce, based its decision on the fact that the facilities in the way in which they were maintained were not a necessary part of the movement of the products, but were a convenience maintained by the oil company for the operation of its distribution system. Mr. Chief Justice TAFT wrote, page 296:

"The important controlling fact in the present controversy and what characterizes the nature of the commerce involved, is that the plaintiff's whole plan is to arrange deliveries of all of its oil purchases on the seaboard of Florida so that they may all be there stored for convenient distribution in the state to the 123 bulk stations. * * * There is neither necessity nor purpose to send the oil through these seaboard storage stations to interior points by immediate continuity of transportation. * * * There is nothing to indicate that the destination of the oil is arranged for or fixed in the minds of the sellers beyond the primary seaboard storages. * * * Everything that is done after the oil is deposited in the storage tanks * * * is done in the distribution of the oil to serve the purposes of the plaintiff company that imported it."

Thus the court distinguishes that case for us from the facts of the case at bar.

Three additional cases might be mentioned in which state taxes were held valid because the courts found that stoppage in transit had broken continuity and therefore that interstate commerce had not commenced at the time of the

incidence of the tax. *Federal Compress and Warehouse Co.* v. *E. R. McLean, Sheriff*, 291 U. S. 17; *Chassaniol* v. *City of Greenwood*, 291 U. S. 584, and *Parker* v. *Brown*, 317 U. S. 341. In the *Federal Compress* case Mississippi was levying an excise tax on the business of warehousing and compressing cotton. The Compress Company sought to avoid the incidence of the tax on the grounds of interstate commerce since the cotton was shipped into its warehouse from various points in the state and after compressing was again shipped, this time out of the state. The tax was not on transporting but on storing and processing, and the storing and processing, this Court held, broke the shipment of the cotton. Here there was definitely something more than a mere stoppage in transit which was necessary and incidental to the transportation as in the case at bar. The *Chassaniol* case is very similar in its facts to the *Federal Compress* case and the court followed that case in rendering a decision. The tax was a local occupation tax on the business of buying and selling cotton. Again there was transportation both before and after the operation on which the tax was levied. But the processing of the cotton and dealing in it on the open market was held to be separate and distinct from the shipment. In *Parker* v. *Brown*, the question was whether or not the marketing of raisins by the grower was interstate commerce, and it was conceded the raisins were eventually shipped out of the state. But it was shown that the packers, to whom the grower sold the raisins, processed and packaged them before shipment. The court held that this was manufacture and was not interstate commerce. These three cases must all be limited strictly to the factual situations there involved. As Mr. Justice FRANKFURTER stated in *Freeman* v. *Hewit*, 329 U. S. 249, 252, each "must be read in the setting of the particular

cases and as the product of preoccupation with their special facts." They cannot be construed broadly. In fact, in *Anderson, Clayton & Co.* v. *Wichita Valley Ry. Co., et al.*, 15 Fed. Supp. 475, the factual situation was almost identical to the *Federal Compress* case, but the question of interstate commerce involved the initial transporting rather than the intermediate processing, and the court held this initial transporting to be part of the continuous interstate commerce. The court distinguished the *Federal Compress* case and the *Chassaniol* case. These cases clearly cannot be applied to the facts in the instant case. In those cases the tax was on some operation other than transporting and it was such an operation that the courts felt it could not be tied into the transportation. Here this court does not even have to consider this problem as the operation on which the tax falls in this case is admittedly transportation.

The Mississippi Supreme Court in its opinion in this case has conceded that there is no appreciable stoppage of the oil in transit. In its opinion 35 So. (2d) 73, 79, (Tr.53) the court stated:

> "It may be also conceded for the purpose of this decision, but without admitting that the pipe line company is engaged in interstate commerce, that there is no appreciable interruption at the railroad shipping point in the continuity of the transportation of the oil from the tanks on the producing oil leases to its out of state destinations."

3. *The essential character of the appellant's activity makes it a part of interstate commerce.*

Once it has been established that certain goods are moved across a state line and that there is continuity between that movement and a prior or subsequent movement entirely within a state, the only other consideration which

the courts have given in determining whether the movement from point to point within the state is part of interstate commerce is the question of the essential character of that movement.

It is a well settled doctrine that the essential character of the shipment and not merely the form of contract or method of billing determines the shipment to be interstate or intrastate commerce. The principle seems to be clearly established. *Railroad Commission* v. *Worthington*, 225 U. S. 101; *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission*, 219 U. S. 498; *Texas and N. O. R. Co.* v. *Sabine Tram Co.*, 227 U. S. 111; *Western Oil Refining Co.* v. *Lipscomb*, 244 U. S. 346. Counsel for appellee in the courts below relied strongly upon the case of *Superior Oil Company* v. *State of Mississippi*, 280 U. S. 390, but that case is simply a good example of the triumph of substance over form. There the court ignores the terms of a contract by which the parties had sought to put themselves in interstate commerce and looks to the facts. These facts show (*1*) transportation within the state, (*2*) a sale, (*3*) transportation by the buyer beyond the state. On these facts the court held that the sale was taxable. But that is only a reassertion of the well established doctrine of taxability of local sales as distinguished from subsequent transportation out of the state.

In the case at bar we have the essential character of the operation clearly established as interstate commerce by:

a. Delivery of the oil to a common carrier, and

b. Intent clearly established by all attendant circumstances that the oil is to move by common carrier out of the state.

a. The oil is committed to a common carrier for transportation out of state when it is turned over to the appellant:

In the present case the appellant never undertakes to move oil except when a tender of shipment has first been made by the owner thereof. This tender shows the quantity of oil to be moved, its destination beyond the state, routes and other necessary information. Being a common carrier the appellant is then obligated to take the oil as soon as it has space available. The oil is pumped from lease tanks into the appellant's lines and once there said oil is committed to complete its journey to the destination named in the tender of shipment, always in this case outside the State of Mississippi. When the shipper parts with the possession of the oil and turns it over to appellant at the lease tanks, the oil is committed to move in interstate commerce to its out of state destination and by way of the routes previously designated on the tender of shipment. It is thereafter out of the control of the shipper except for the power reserved to the owner on all interstate shipments by common carrier to change the destination or routing in transit. This right of the owner to change his mind after the shipment has been committed to a common carrier does not change the essential character of the shipment. *Eureka Pipe Line Co.* v. *Hallanan*, 257 U. S. 265; *Hughes Bros. Timber Co.* v. *Minnesota*, 272 U .S. 469.

The appellee concedes the essential character of the shipments to be interstate commerce where the appellant gathers the oil as in the instant case and then delivers said oil to its own trunk pipe lines. Surely these essential characteristics are not lost because no trunk pipe line has been built and the oil must instead be delivered to a railroad for shipment out of the state. As has been seen in the discus-

sion of the question of "continuity," the fact that all the operations of a particular carrier are completed in one state does not prevent it from being engaged in interstate commerce. Nor does the fact that the mode of transportation may be changed destroy the essential character of an interstate shipment.

The importance in determining interstate commerce which is attached to the mere fact of commitment of goods to a common carrier is shown by a long line of authority. Mr. Justice HOLMES in *Superior Oil Company* v. *Mississippi*, 280 U. S. 390, 395, said:

> "if by mutual agreement the oil had been put into the hands of a third person, a common carrier, for transportation to Louisiana, the mere possibility that the vendor might be able to induce the carrier to forego his rights might not have been enough to keep the transaction out of interstate commerce,"

indicating that in that event the terms of the contract would have been respected. The Supreme Court of California voiced this idea in *Richfield Oil Corp.* v. *State Board of Equalization*, 27 Cal. (2d) 150, 163 P. (2d) 1, 3, when it said a different result might have followed if the oil had been delivered to a common carrier:

> "for then it would have been placed in the hands of an instrumentality whose sole purpose is to export goods, thus indelibly characterizing the process as a part of exportation."

The Supreme Court of the United States in its review of this *Richfield* case, *Richfield Oil Corp.* v. *State Board of Equalization*, 329 U. S. 69, quoted this language of the state court, and while they decided the case under the Import-Export Clause, the following language of Mr. Justice DOUGLAS is just as applicable under the Commerce Clause

to show the point of commencement of transportation, 329 U. S. 82-83:

> "The certainty that the goods are headed to sea and that the process of exportation has started may normally be best evidenced by the fact that they have been delivered to a common carrier for that purpose. But the same degree of certainty may exist though no common carrier is involved. * * * It would not be clearer that the oil had started upon its export journey had it been delivered to a common carrier at an inland point. The means of shipment are unimportant so long as the certainty of the foreign destination is plain."

In our case we have the best evidence. The oil has been placed in the hands of a common carrier whose sole purpose is to transport goods to an out of state destination, thus indelibly characterizing the process as a part of interstate commerce. The stream of commerce has by this commitment been set in motion.

This rule as to the commencement of interstate commerce is stated in unmistakable terms in 11 American Jurisprudence, Commerce, Par. 70:

> "The beginning of the transit which constitutes interstate commerce is the point of time that an article is started on its ultimate passage. This has been said to be when the articles have been delivered or tendered to a common carrier for transportation from the state or for transportation to another carrier for export though on a local bill of lading."

See also, *Texas and N. O. R. Co.* v. *Sabine Tram Co.*, 227 U. S. 111, and *A. G. Spaulding Bros.* v. *Edwards*, 262 U. S. 66.

A situation closely analogous to the common carrier situation exists where goods are otherwise committed to a conveyance system so that short of a complete change in

plan by those in charge the goods will go into interstate commerce. In *Jersey Central Power and Light Company* v. *Federal Power Commission,* 319 U. S. 61, a case relied on by counsel for appellee in the courts below, the question was whether or not Jersey Central was engaged in interstate commerce so as to be subject to regulation by the Federal Power Commission. Its facilities and operations were all in New Jersey but its lines were connected with the lines of another company, also in New Jersey, which in turn had a connection with a company operating in New York. Power was not regularly sold from one to the other of these companies, but the connections were maintained on a standby basis to be used in an emergency or in case of excess of power on the part of one of the companies. Yet Jersey Central was held in that case to be engaged in interstate commerce. The mere fact that power might cross the state line, that the necessary conduit existed, was sufficient. And the fact that there was a sale before the state line was reached was held not important. The same decision was reached in *Hartford Electric Light Co.* v. *Federal Power Commission,* 131 F. (2d) 953, where the court explained and restricted the decision in the *Superior Oil* case to the particular facts there involved.

b. Intent is present when the oil is turned over to the appellant to ship it out of Mississippi:

The essential character of the shipment is based largely on the intent of the parties, and intent while not in itself conclusive, has come to be one of the touch-stones by which interstate commerce is determined. In the case of *Texas* v. *Anderson, Clayton and Co.,* 92 F. (2d) 104, 107, the court said:

> "It is well settled that in determining whether a particular movement of freight is interstate or intra-

state or foreign commerce, the intention existing at the time the movement starts governs and fixes the character of the shipment."

There can be no doubt as to the intent in this case. As has already been pointed out, the tenders of shipment given appellant all show a destination outside the state. All the movements of oil handled by the appellant in the case at bar are intended for, and in fact arrive at, points outside the State of Mississipi. None of the parties involved ever have any other intention or thought. The fact of commitment to a common carrier is strong evidence of that intent and the weight attached to such commitment has already been pointed out.

The rule as to the importance of the essential character and the intent is illustrated and applied to pipe lines in the recent case of *Interstate Natural Gas Co., Inc.*, v. *Federal Power Commission*, 331 U. S. 682, decided by this Court on June 16, 1947. In that case gas produced from the company's wells flows into its field gathering lines, then into trunk lines and then to compressor stations where it is sold to other companies. These companies increase the pressure of the gas and then move it out of the state. The question was whether or not the sales are part of interstate commerce so as to be subject to the regulation of the Federal Power Commission. Mr. Chief Justice VINSON in his opinion deciding that the sales are part of interstate commerce held as follows, page 685:

"The entire movement of the gas from the wells to the purchasing companies through the compressor pumps and across the state lines is a continuous process without interruption for storage, processing or for any other purpose."

On page 687:

> "Under the circumstances described by the Commission, it is clear that the sales in question were quite as much in interestate commerce as they would have been had the pipes of the petitioner crossed the state line before reaching the points of sale."

On page 689:

> "Long before the gas reaches the compressor pumps it has been committed to its interstate journey which follows without interruption or deviation. Under such circumstances, the increase of pressure in the compressor stations must be regarded as merely an incident in the interstate commerce rather than as its origin."

See also, *United States* v. *Erie Railroad Co.*, 280 U. S. 98; *Railroad Commission* v. *Worthington*, 225 U. S. 101; *United States* v. *Union Stockyard and Transit Company*, 226 U. S. 286; *Baltimore and O. S. W. R. Co.* v. *Settle*, 260 U. S. 166.

In connection with the question of intent two additional cases on which counsel for appellee relied in the courts below should be mentioned. *New York, ex rel. Pennsylvania R. Co.*, v. *Knight*, 192 U. S. 21, was a case in which an interstate railroad furnished its passengers with taxicab service to and from its terminus. This Court held, page 28, that

> "cab service is an independent local service, preliminary or subsequent to any interstate transportation."

But Mr. Justice BREWER in the opinion, page 26, pointed out that the

> "party receiving it [the service] owes no legal duty of crossing the state line."

Thus the opinion turned on the fact that people and not goods were being transported; that people have a will of their own and are not committed to any course of action

until they finally board the vehicle for actual interstate movement. This distinction was made the following year in *Swift and Co.* v. *United States*, 196 U. S. 375, where the Court distinguished the *Knight* case, saying the transportation of persons was different from "cartage for the delivery of meats sold to dealers * * * throughout the states." Such cartage was there held to be a "part of the contemplated transit, cartage for delivery of the goods," and not an "independent matter." The *Knight* case was also explained and the distinction made in the *Swift* case was cited in *Stafford* v. *Wallace*, 258 U. S. 495. The case was also distinguished in *Puget Sound Stevedoring Co.* v. *Tax Commission*, 302 U. S. 90. But the distinction between persons and goods and the attitude of this Court toward the two types of transportation is even more clearly shown in another case cited below by counsel for appellee, the very recent case of *United States* v. *Yellow Cab Company, et al.*, 332 U. S. 218 (June 23, 1947). This case while following the *Knight* case in holding cab service to or from a railroad station at the beginning or end of an interstate trip to be intrastate commerce, carefully distinguished the transportation of persons from the transportation of goods. Mr. Justice MURPHY in the opinion of the Court used the following language, page 231:

> "In a sense, of course, a traveler starts an interstate journey when he boards a conveyance near his home, office or hotel to travel to the railroad station * * *. But interstate commerce is an intensely practical concept drawn from the normal and accepted course of business. * * * Moreover, what may fairly be said to be the limits of an interstate shipment of goods and chattels may not necessarily be the commonly accepted limits of an individual's interstate journey. We must accordingly mark the beginning and end of a

particular kind of interstate commerce by its own practical considerations."

The court then goes on to explain the freedom of choice which an individual may exercise in choosing his mode of transportation to and from the station, including "his own two legs." This freedom of choice destroys the essential continuity between the cab service and the interstate movement. But no such freedom of choice exists in the case of a barrel of oil and the rule for goods and chattels, as hinted in the *Knight* case itself and as set out in so many words in the *Yellow Cab* case and as ruled in the *Swift and Co.* case, is different from that for persons. Once a barrel of oil has been committed to a common carrier for shipment to an out of state destination, the barrel of oil cannot change its mind and all authorities are agreed that interstate commerce has commenced. The taxicab cases may also be distinguished from the case at bar in that the taxicab companys are not common carriers and their business is primarily local whereas in our case the appellant is a common carrier in the same sense as is the railroad and it is moving no oil to local destinations.

Before leaving the question of whether the operations of this appellant are interstate commerce, we should like to distinguish two cases cited by the attorney for appellee in the state courts which we have not touched on in our brief to this point and also to refute an argument used by said attorney in seeking to distinguish some of the cases cited by us in this brief.

The widely cited *Department of Treasury of Indiana v. Wood Preserving Corporation*, 313 U. S. 62, was cited below by atterney for appellee. The Indiana gross receipts tax in that case was applied to the proceeds of the sale of

railroad ties which were immediately thereafter shipped out of the state. We have no dispute with this case in which the gross receipts tax was applied not to the transportation but to a sale prior to transportation out of the state. We fail to see its applicability to our case. The attorney for the appellee used another case involving this Indiana gross receipts tax in his brief below, *Department of Treasury of Indiana* v. *Ingram-Richardson Manufacturing Co. of Indiana*, 313 U. S. 252. The receipts there taxed were derived from services rendered in the enameling of metal fixtures, but included also the charge for trucking the parts into the state for processing and out again afterwards. The court held that the major service was the purely intrastate operation of enameling. Mr. Chief Justice HUGHES in the opinion said, at page 255:

> "The transportation of the metal parts to and from Indiana were but incident to that intrastate business."

And it was on that basis that the tax was allowed to fall on that part of the service. Even then the court went on to suggest that if the company had made a separation of the charge for transportation services and had claimed an exemption therefor that they could have sustained their claim.

In the courts below, counsel for appellee sought to distinguish a number of the cases cited in this brief on the grounds that they involved the question of ad valorem taxation and were, therefore, not applicable to an excise tax case. This view of these cases misses the fact that they have not been cited to establish the validity or invalidity of the excise tax but have been cited to establish the existence of interstate commerce. The question of whether interstate or intrastate commerce was involved had to be decided in all of those cases as a preliminary to a decision on

the validity of the tax. The only contention of the counsel for appellee in the courts below was that the facts in our case constituted intrastate commerce and it was on that basis that the tax was sustained. Thus, the ad valorem tax cases are cited as authorities for the proposition that the activities of this appellant involved herein constitute interstate commerce. The basic principle of the exemption—interstate commerce—is identical in the case of property taxes and excise taxes although the power of the states to levy property taxes and to levy excise taxes on gross receipts from interstate commerce differs by reason of the more direct burden of the latter type of tax on the commerce and its susceptibility to duplication in the several taxing jurisdictions affecting the commerce.

B.

The State of Mississippi Does Not Have the Authority to Levy and Collect a Tax on the Privilege of Carrying on Interstate Commerce Measured by the Gross Receipts Derived by the Appellant, a Common Carrier, from said Interstate Commerce.

Once we have established the proposition that those activities of this appellant which are involved in this lawsuit are in interstate commerce and are a part thereof, we come to the second point for consideration in the determination of the validity of the tax—does a state have the power without conflicting with Article I, Section 8, Clause 3, of the Federal Constitution to levy an unapportioned privilege tax based on the gross receipts derived from interstate commerce?

As heretofore stated appellee has never made this claim in the courts below, and has based the right to tax appellant's gross receipts on the theory that they were derived from intrastate commerce. If appellee had considered

the Mississippi statute as levying a tax on interstate commerce, he would not have singled out the particular operations of appellant on which he has here levied a tax. These particular operations were subjected to tax because they were considered as intrastate commerce. Similarly the Supreme Court of Mississippi in its decision in this case held the tax valid on the grounds that appellant was engaged in intrastate commerce. Appellant now suggests that this Honorable Court hold the Mississippi courts to have erred in not holding the operations involved herein to be interstate commerce and the Mississippi statute as construed and applied to be void and of no effect by reason of being repugnant to the Commerce Clause of the Constitution of the United States.

In support of the unconstitutionality of the Mississippi statute as applied herein we shall seek to establish the following propositions:

1. The State of Mississippi does not have the power under the Commerce Clause of the Constitution of the United States to levy a privilege tax based on the gross receipts derived from interstate commerce in addition to state taxes on net income, proberty and corporate franchise.
2. Even if the state has the power in general to levy a privilege tax based on the gross receipts derived from interstate commerce, the tax in this case is a burden on interstate commerce and unconstitutional because
   a. It is not apportioned, and
   b. It is discriminatory.

1. ***The State is barred by the Commerce Clause of the Constitution of the United States from levying a privilege tax based on the gross receipts derived from interstate commerce.***

Article I, Section 8, Clause 3, of the Constitution of the United States does not specifically and directly prohibit anything. It provides simply:

> "The Congress shall have power * * * To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes * * *."

The process of arriving at a definite and reasonable application of this clause, generally known and identified in this brief as the Commerce Clause, so as to relieve the states from undue restriction in the regulation of intrastate commerce while preserving to the Federal Government its constitutional power to regulate commerce among the states has given rise to numerous court decisions. In the course of these voluminous decisions bearing on the broad field of the powers of the federal and state governments in the regulation of interstate and intrastate commerce, some definite and well established principles have evolved.

Mr. Chief Justice MARSHALL in the decision of *Gibbons* v. *Ogden*, 22 U. S. 1, as early as 1824 established the principle that the power to regulate interstate commerce is completely and exclusively vested in the Federal Government. This general pronouncement has been the guiding star of our courts for over one hundred years and in the recent case of *Freeman* v. *Hewit*, 329 U. S. 249, Mr. Justice FRANKFURTER, writing for the majority of this Court, said, at page 252:

> "Our starting point is clear. In two recent cases we applied the principle that the Commerce Clause was not merely an authorization to Congress to enact

laws for the protection and encouragement of commerce among the states, but by its own force created an area of trade free from interference by the states. In short, the Commerce Clause even without implementing legislation by Congress is a limitation upon the power of the states. *Southern P. Co.* v. *Arizona*, 325 U. S. 761, * * *; *Morgan* v. *Virginia*, 328 U. S. 373, * * *. In so deciding we reaffirmed, upon fullest consideration, the course of adjudication unbroken through the nation's history. This limitation on state power, as the *Morgan* case so well illustrates, does not merely forbid a state to single out interstate commerce for hostile action. A state is also precluded from taking any action which may fairly be deemed to have the effect of impeding the free flow of trade between states. It is immaterial that local commerce is subjected to a similar encumbrance."

Another important pronouncement by this Court is recognized as axiomatic. In 1887 in *Philadelphia & S. Mail S. S. Co.* v. *Pa.*, 122 U. S. 326, 336, this Court said:

"But taxing is one of the forms of regulation. It is one of the principal forms."

Again in *Freeman* v. *Hewit*, Mr. Justice FRANKFURTER indicates how the present Court feels about this doctrine, 329 U. S. 252-253:

"These principles of limitation on state power apply to all state policy no matter what state interest gives rise to its legislation. A burden on interstate commerce is none the lighter and no less objectionable because it is imposed by a state under the taxing power rather than under manifestations of police power in the conventional sense."

If we put these two doctrines together, that Congress has exclusive jurisdiction of interstate commerce and that taxation amounts to regulation, all state taxation of inter-

state commerce would be barred *ab initio*. The courts have seen fit, however, to soften this rule. Let us return to the language of Mr. Justice FRANKFURTER in *Freeman* v. *Hewit*, at page 253:

> "But, in the necessary accommodation between local needs and the overriding requirement of freedom for the national commerce, the incidence of a particular type of state action may throw the balance in support of the local need because interference with the national interest is remote or unsubstantial."

The courts have sought to maintain a balance between the need of the states to finance the cost of their governmental services on the one hand and the requirement of the Constitution that states not interfere with interstate commerce on the other hand.

One of the doctrines that has grown out of this searching by the courts is the so-called "share the burden" theory. The leading case on this theory is *McGoldrick* v. *Berwind-White Coal Co.*, 309 U. S. 33. There the tax in question was a New York City sales tax of 2%, which had in that case been levied on the proceeds of the sale in the city of coal which had been brought into the city from outside the State of New York. The Court upheld the tax on the theory stated at page 49, that:

> "interstate commerce admittedly must bear its fair share of state tax burden * * *."

But even in enunciating this theory the Court said on page 48:

> "Certain types of tax may, if permitted at all, so readily be made the instrument of impeding or destroying interstate commerce as plainly to call for their condemnation as forbidden regulations. Such are the taxes already noted which are aimed at or discriminate

against the commerce or *impose a levy for the privilege of doing it, or tax interstate transportation or communication or their gross earnings*, or levy an exaction on merchandise in the course of its interstate journey." (Emphasis supplied.)

While discussing the "share the burden" concept, we should like to call the Court's attention to the fact that the appellant herein in paying the State of Mississippi a very sizable income tax on its net taxable income in the state, that it is paying ad valorem taxes on all its property in the state, that it is paying a franchise tax based on capital and surplus employed in Mississippi, and that it is paying all the other numerous taxes direct and indirect which form a part of the costs of doing business in that state. But in connection with the "share the burden" theory and its limitations let us return again to the language of Mr. Justice FRANKFURTER in *Freeman* v. *Hewit*. At 329 U. S. 253, he writes:

> "State taxation falling on interstate commerce * * *, can only be justified as designed to make such commerce bear a fair share of the cost of the local government whose protection it enjoys. But revenue serves as well no matter what its source. To deny to a state a particular source of income because it taxes the very process of interstate commerce does not impose a crippling limitation on a state's ability to carry on its local function. Moreover, the burden on interstate commerce involved in a direct tax upon it is inherently greater, certainly less uncertain in its consequences, than results from the usual police regulations. The power to tax is a dominate power over commerce. Because the greater or more threatening burden of a direct tax on commerce is coupled with the lesser need to a state of a particular source of revenue, attempts at such taxation have always been more carefully scrutinized and more consistently resisted than police power regulations of

aspects of such commerce. The task of scrutinizing is a task of drawing lines."

We now come to the task of scrutinizing the lines that this Court has drawn. That scrutiny reveals that this Court has never permitted a state tax levied directly upon gross receipts from the transportation of goods, persons or messages in interstate or foreign commerce or levied directly on the goods while in transit or exacted as a fee for the privilege of engaging in such traffic. The rule was well stated in the opinion of this Court in *New Jersey Bell Telephone Co.* v. *State Board of Taxes and Assessments*, 280 U. S. 338; 346, where the court said:

> "It is elementary that a state may tax property used to carry on interstate commerce. But, as the Constitution vests exclusively in the Congress power to regulate interstate and foreign commerce, a state may not tax, burden or interfere with such commerce or tax as such gross earnings derived therefrom or impose a license fee or other burden upon the occupation or the privilege of carrying on such commerce, whatever may be the instrumentalities or means employed to that end."

We have already seen in *McGoldrick* v. *Berwind-White Coal Co.*, 309 U. S. 33, that in drawing its lines the court has permitted a tax on the sale of property at the conclusion of an interstate journey. We have seen in *Department of Treasury of Indiana* v. *Wood Preserving Corp.*, 313 U. S. 62, and *Superior Oil Co.* v. *State of Mississippi*, 280 U. S. 390, that a sales tax is also permitted on the proceeds of a sale of property immediately preceding the interstate shipment of that property, where the vendee makes the interstate shipment. The case of *J. D. Adams Mfg. Co.* v. *Storen*, 304 U. S. 307, presents the other side of the picture. There the Indiana gross receipts tax was applied to gross sales

of an Indiana manufacturing company although the company shipped its products out of the state and the court held the tax invalid as a burden on interstate commerce. Still another case involving a sales tax is that of *Gwin, White & Prince* v. *Henneford*, 305 U. S. 434, in which this Court held invalid a state tax measured by gross receipts from the business of marketing fruit shipped in interstate commerce from the state of production to places in other states where the sale and deliveries were made. We have already noted in *Federal Compress and W. Co.* v. *McLean*, 291 U. S. 17, and *Parker* v. *Brown*, 317 U. S. 341, that a state tax is permissible on the privilege of processing personal property temporarily withdrawn from transit; and in *Chassaniol* v. *City of Greenwood*, 291 U. S. 584, that a tax is allowed on the business of buying and selling property immediately preceding an interstate shipment thereof. We have already mentioned and quoted authority to the effect that personal property is subject to state ad valorem taxation immediately before (*Coe* v. *Errol*, 116 U. S. 517) and immediately after (*Woodruff* v. *Parham*, 75 U. S. 123; *Atlantic Coast Line R. Co.* v. *Standard Oil Company of Kentucky*, 275 U. S. 257) its interstate shipment and even between two shipments when it has been temporarily withdrawn from transportation as in *Minnesota* v. *Blasius*, 290 U. S. 1. But state ad valorem taxation is never permitted on goods in interstate commerce, even though there may be a temporary interruption as in *Champlain Realty Co.* v. *Brattleboro*, 260 U. S. 366, and *Carson Petroleum Company* v. *Vial*, 279 U. S. 95, in the actual movement of the property. State taxes have been sustained too on the storage and use of personal property immediately following an interstate shipment as in *Henneford* v. *Silas Mason*, 300 U. S. 577, even when the property is to be used in interstate commerce, *Southern Pa-*

cific v. *Gallagher*, 306 U. S. 167. This Court has permitted state taxation of net income from interstate commerce on that part of the net income fairly attributable to the taxing state as in *Underwood Typewriter Company* v. *Chamberlain*, 254 U. S. 113. The Court has permitted state franchise taxes in lieu of ad valorem taxes on property employed directly in interstate commerce as in *Postal Telegraph Cable Co.* v. *Adams*, 155 U. S. 688; and capital stock taxes in lieu of ad valorem taxes as in *Pullman's Palace Car Co.* v. *Pennsylvania*, 141 U. S. 18. The Court has also permitted state franchise taxes on interstate carriers where the carrier had qualified to do intrastate business and the franchise tax is a license for the exercise of its corporate powers in such business, whether or not the intrastate business is actually carried on (*Interstate Natural Gas Co.* v. *Stone*, 308 U. S. 522). Then in the recent case of *Memphis Natural Gas Co.* v. *Stone*, 385 U. S. 80, this Court upheld a franchise tax on an interstate carrier which had not qualified to carry on and was not carrying on intrastate business but which was only engaging in such intrastate activities as were necessary to its interstate business. The Court based its opinion on the finding of the Mississippi Supreme Court that the tax was not on the privilege of doing business but was "an exaction * * * as a recompense for * * * protection of * * * the local activities." This Court concluded, page 96:

> "This is a tax on activities for which the state, not the United States, gives protection and the state is entitled to compensation when its tax cannot be said to be an unreasonable burden or a toll on the interstate business."

In so far as the case of *Ozark Pipe Line* v. *Monier*, 266 U. S. 555, had held that the state activities which were incidental to interstate commerce could not be subjected to

a license tax, the Court in the *Memphis Natural* case said, "we disagree," but it sought to distinguish the taxes on grounds of a different purpose, the *Ozark* case admittedly involving a tax for the privilege of doing business. In the *Memphis Natural* case the majority opinion very carefully points out, page 93:

> "that the Mississippi statute here involved is not upon the privilege of doing an interstate business."

And again the majority stated, page 93:

> "This tax is not an unapportioned tax on gross receipts from the commerce itself."

Thus the *Memphis Natural* case can be readily distinguished from the case at bar for in our case the Supreme Court of Mississippi in its opinion repeatedly characterized the tax as appears on page 45 of the transcript of record, 35 So. (2d) 74, as a:

> "privilege tax for operating these pipe line systems for transporting the oil from one point to another in this state."

The tax is clearly based on the gross receipts derived from carrying on that business. Thus the tax in this case is exactly what the court said the tax in the *Memphis Natural* case was not when it held it valid, a tax on the privilege of doing interstate business, based on the gross receipts from that business.

In previous years this Court has uniformly held that the states could not levy license taxes, even at a flat fee, for the privilege of engaging in interstate commerce. The Court decided that such a tax could not be levied for the transportation of persons in *Crandall v. Nevada*, 73 U. S. (6 Wall.) 35, in 1868.

In 1873 in *Philadelphia & Reading R. Co.* v. *Pennsylvania (case of the State Freight Tax)*, 82 U. S. (15 Wall.) 232, this Court was confronted with the question of whether or not the State of Pennsylvania could levy a tax on carriers within the state based on the amount and type of freight carried by them, including their interstate freight. The Court held that this tax resulted in the very type of regulation of interstate commerce which the framers of the Constitution had in mind when they conferred that regulation upon the Congress. The Court said at page 276:

> "The Legislature of Pennsylvania has, in effect, declared that every ton of freight taken up within the state and carried out, or taken up in other states and brought within her limits, shall pay a specified tax. The payment of that tax is a condition upon which is made dependent the prosecution of this branch of commerce. And as there is no limit to the rate of taxation she may impose, if she can tax at all, it is obvious the condition may be made so onerous that an interchange of commodities with other states would be rendered impossible. The same power that may impose a tax of two cents per ton upon coal carried out of the state may impose one of $5. Such an imposition whether large or small, is a restraint of the privilege or right to have the subjects of commerce pass freely from one state to another without being obstructed by the intervention of state lines * * *. Nor can it make any difference that the legislative purpose was to raise money for the support of the state government, and not to regulate transportation. It is not the purpose of the law, but its effect, which we are now considering. Nor is it at all material that the tax is levied upon all freight, as well that which is wholly internal as that embarked in interstate trade * * * The state may tax its internal commerce; but if an act to tax interstate or foreign commerce is unconstitutional, it is not cured by includ-

ing in its provisions subjects within the domain of the state."

Applying a portion of the above reasoning to the present case, we might point out that while some members of this Court may feel that the present Mississippi tax of 2% is not large enough to be burdensome or to interfere with the interstate movement of this oil, yet it is not the size of the present tax but the principle involved on which the Court must base its opinion. If the state has the power to levy a tax of 2% on appellant's gross receipts, it has the power to levy a tax of 20%, or even of 50%, and it requires no stretch of the imagination to recognize that t atter rate would drive the appellant and all other pipe line companies out of this type of operations and so would undeniably be an interference with this commerce.

In 1888 the privilege tax rule was applied to a telegraph company for the privilege of sending interstate messages, *Leloup* v. *Mobile*, 127 U. S. 640; and in 1891 the court held that an express company could not be charged a state license for the privilege of transportating property in interstate commerce, *Crutcher* v. *Kentucky*, 141 U. S. 47. In *Sprout* v. *South Bend*, 277 U. S. 163, (1928) the Court again held that a flat license tax could not be levied by a state for the privilege of transporting persons in interstate commerce.

In *State Tax Commission* v. *Interstate Natural Gas Co., Inc.*, 284 U. S. 41, (1931) the State of Mississippi under its privilege tax code sought to levy, Title 38, Paragraph 9606 of Mississippi Code, 1942, Annotated:

> "Upon each person engaging or continuing in this state in the business of operating a pipe line, or transporting in or through this state oil * * * a tax,"

at a fixed amount depending on size of pipe and length of

line. This tax, as the tax in the case at bar, was levied for the privilege of operating an oil pipe line. The main difference between the tax there and in the present case was in its measurement, there at a flat rate, here varying according to amount of business done. But in that case this Court held the tax invalid when applied to interstate commerce, even though it was not measured by gross receipts. The State of Mississippi is seeking through the tax in this case to exact from an interstate pipe line a levy for the privilege of conducting an interstate business which was denied to it by this Court in the above case by changing the computation from a fee, based on mileage to a graduated fee based on receipts, when in fact the latter computation is a more direct burden on commerce than the first.

On the other hand even taxes based on gross receipts derived from interstate commerce have been permitted where they are in lieu of ad valorem taxes on the property employed in that commerce as in *Cudahy Packing Co.* v. *Minnesota*, 246 U. S. 450. In *Maine* v. *Grand Trunk R. Co.*, 142 U. S. 227, this Court by a 5 to 4 decision held an "excise tax for the privilege of exercising its franchise" valid although based upon gross receipts from interstate commerce. In reaching this decision the court was very careful not to hold that gross receipts were taxable. In the decision the majority refer to *Philadelphia & So. M. S. S. Co.* v. *Pennsylvania*, 122 U. S. 326, which it perhaps the leading case on the doctrine that states cannot tax gross receipts from interstate commerce, and which is discussed in more details below, with the statement, page 230, that the *Philadelphia* case "in no way conflicts with this decision." They go on to say:

"We do not question the correctness of that deci-

sion, nor do the views we hold in this case in any way qualify or impair them."

Mr Justice HOLMES in *Galveston H. & S. A. R. Co.* v. *Texas*, 210 U. S. 217, in seeking to explain the decision in the *Maine* v. *Grand Trunk* case perhaps comes closest to stating what the Court actually held. He says that the court was apparently looking at the intent of the state and the state seemed to be seeking a measure of the going concern value of the corporation on which to base a tax for the privilege of exercising its franchise. The state chose gross receipts as a measure of going concern value and based the tax on that, without any intent to tax the gross receipts themselves. This "going concern" tax and the local property tax were in lieu of all other taxes and the court decided to go along with the state on its method. In any event, the case is bad law and probably the only reason it has not been specifically overruled is that the court so carefully stated that its opinion was not inconsistent with *Philadelphia & So. M. S. S. Co.* v. *Pennsylvania*, 122 U. S. 326. The *Grand Trunk* case is authority for nothing except the particular set of facts and the particular tax there involved. State franchise taxes measured by gross receipts have also been permitted when the taxpayer was not engaged in interstate commerce but when his gross receipts were derived from the rental of facilities used in interstate commerce as in *New York, L. E. & W. R. Co.* v. *Pennsylvania*, 158 U. S. 431.

But with all this permitted state taxation of interstate commerce and the incidents thereof, this Court from the decision in *Philadelphia & So. M. S. S. Co.* v. *Pennsylvania*, (1887) right down to the present time has never permitted, with the possible exception of the *Maine* v. *Grand Trunk* case, the direct taxation of the interstate commerce itself by the exaction of a privilege tax, measured by gross re-

ceipts on the conduct of such commerce, in addition to the taxation of the property used in the commerce. As has been already stated, this appellant is paying the State of Mississippi an ad valorem tax on all its property used in the state, even though that property is being used solely in interstate commerce. It is paying the State of Mississippi an income tax on that portion of its net income derived from activities in the state, even though those activities are interstate commerce. It is paying the State of Mississippi a franchise tax for the right to do local business within the state although no local business is being transacted. All of these taxes are permitted under the Commerce Clause as we have seen. But this additional tax, which, if the first premise of this brief is correct, and accepting the Mississippi Supreme Court's interpretation of the state statute, is a privilege tax on the right to conduct interstate business within the state, based on the gross receipts derived from that business, and is the very type of tax which this Court has again and again condemned.

In 1887 in *Philadelphia & Southern Mail Steamship Co.* v. *Pennsylvania*, 122 U. S. 326, this Court was confronted, in its own words, with the question:

> "whether a state can constitutionally impose upon a steamship company, incorporated under its laws, a tax upon the gross receipts of such company derived from the transportation of persons and property by sea, between different states and to and from foreign countries."

After reasoning that transportation is commerce and that taxation of transportation is regulation of commerce, the unanimous Court continues at page 336:

> "If, then, the commerce carried on by the plaintiff in error in this case could not be constitutionally taxed

by the state, could the fares and freights received for transportation in carrying on that commerce be constitutionally taxed? If the state cannot tax the transportation, may it, nevertheless tax the fares and freight received therefor? Where is the difference? Looking at the substance of things, and not at mere forms, it is very difficult to see any difference. The one thing seems to be tantamount to the other. It would seem to be rather metaphysics than plain logic for the state officials to say to the company, 'We will not tax you for the transportation you perform, but we will tax you for what you get for performing it.' Such a position can hardly be said to be based on a sound method of reasoning."

The Court continues on page 338:

"Of what use would it be to the ship owner, in carrying on interstate and foreign commerce, to have the right of transporting persons and goods free from state interference if he had not the equal right to charge for such transportation without such interference? The very object of his engaging in transportation is to receive pay for it. If the regulation of the transportation belongs to the power of Congress to regulate commerce, the regulation of fares and freights receivable for such transportation must equally belong to that power; and any burdens imposed by the state on such receipts must be in conflict with it."

Here in this language of the Court we see the basic and fundamental reason this Court has drawn the line and refused to allow state taxation of the gross receipts of interstate commerce. Unlike property taxes and income taxes and taxes on the transfer of title to property, gross receipts taxes are so closely linked to the transportation itself that a tax of one is actually a tax of the other, and so a tax on gross receipts is tantamount to a tax on the transportation itself and is strictly within the domain of Congress. (As

witness the Federal Pipe Line Transportation Tax, 26 U. S. C. A., paragraph 3460.) In concluding that opinion in the *Philadelphia & S. M. S. S. Co.* case, Mr. Justice BRADLEY writing for the unanimous Court states, page 345:

> "The corporate franchises, the property, the business, the income of corporations created by a state may undoubtedly be taxed by the state; but in imposing such taxes care should be taken not to interfere with or hamper, directly or by indirection, interstate or foreign commerce, or any other matter exclusively within the jurisdiction of the Federal Government. This is a principle so often announced by the courts, and especially by this court; that it may be received as an axiom of our constitutional jurisprudence."

Then on page 346 he states:

> "It is hardly within the scope of the present discussion to refer to the disastrous effects to which the power to tax interstate or foreign commerce may lead. If the power exists in the state at all, it has no limit but the discretion of the state, and might be exercised in such a manner as to drive away that commerce, or to load it with an intolerable burden, seriously affecting the business and prosperity of other states interested in it; and if those states, by way of retaliation, or otherwise, should impose like restrictions, the utmost confusion would prevail in our commercial affairs."

Mr. Justice BRADLEY then quotes Mr. Chief Justice MARSHALL'S opinion in *Brown* v. *Maryland*, 25 U. S. (12 Wheat.) 419, to the effect that prior to the adoption of our present Federal Constitution and system of government just such confusion did exist because of state taxation of interstate commerce, and that confusion was probably the leading factor in precipitating the Constitutional Convention and the adoption of the Constitution.

In 1888, the year following the *Philadelphia & So. M. S. S. Co.* case, this Court decided another case dealing with gross receipt taxes. *Ratterman* v. *Western Union*, 127 U. S. 411, involved the question of a tax by Ohio on the receipts of a telegraph company. The Court indicated it considered the law well settled when it stated, page 424:

> "Neither are we of opinion that there is any real question, under the decisions of this court, in regard to holding that so far as this tax was levied upon receipts properly appurtenant to interstate commerce that it was void."

In 1908 we come to another land mark in the law on state taxation of gross receipts derived from interstate commerce, Mr. Justice HOLMES' opinion in *Galveston, Harrisburg & San Antonio Ry. Co.* v. *Texas*, 210 U. S. 217. In that case the State of Texas sought to impose on railroad corporations "an annual tax for the year 1905, and for each calendar year thereafter, equal to 1 percentum of its gross receipts if such line of railroad lies wholly within the state." The lines of the railroads concerned were wholly within the state as are the lines of appellant which are involved in the case at bar, but, just as in this case, there were connections with railroads running out of the state and a portion of the gross receipts were derived from passengers and freight coming from, or destined to, points without the state. Mr. Justice HOLMES after reviewing the authorities and going at some length into the doctrine as set out in *Wisconsin & M. R. Co.* v. *Powers*, 191 U. S. 379, that states "must be allowed to tax the property, and to tax it at its actual value as a going concern," stated, page 227:

> "We are of opinion that the statute levying this tax does amount to an attempt to regulate commerce among the states. The distinction between a tax 'equal

to' 1 per cent of gross receipts, and a tax of 1 per cent of the same, seems to us nothing except where the former phrase is the index of an actual attempt to reach the property and to let the interstate traffic and the receipts from it alone. We find no such attempt or anything to qualify the plain inference from the statute, taken by itself. On the contrary, we rather infer from the judgment of the state court and from the argument on behalf of the state that another tax on the property of the railroad is upon a valuation of that property, taken as a going concern. This is merely an effort to reach the gross receipts, not even disguised by the name of an occupation tax, and in no way helped by the words 'equal to'."

In *Meyer* v. *Wells, Fargo & Co.*, 223 U. S. 298, (1912) the State of Oklahoma was attempting to levy a "gross revenue tax" on public service corporations apportioned so as to tax the Oklahoma portion of their business. The tax was similar to that in the *Galveston, H. & S. A. R. Co.* case and Mr. Justice HOLMES, again writing the opinion of the Court, dismissed the state's contention that the tax was a property tax and held it invalid as a tax applied to the gross receipts derived in part from interstate commerce.

In 1921 two cases involving the same West Virginia taxing statute were decided by this Court. The tax was not a pure gross receipts tax but similar in its effect since it varied with the volume of business done. In *Eureka Pipe Line Co.* v. *Hallanan*, 257 U. S. 265, the tax was on the business of transporting petroleum in pipe lines and amounted to 2 cents for each barrel transported. In *United Fuel Gas Co.* v. *Hallanan*, 257 U. S. 277, the tax was on the transportation of gas. In both cases once the issue was settled that the transportation was interstate, there was no hesitation in holding the tax void. In 1924 in *New Jersey Bell*

Tele. Co. v. *Board of Taxes and Assessments*, 280 U. S. 338, this Court held invalid a franchise tax based on properly apportioned gross receipts in spite of the state's contention that the tax was in lieu of all other taxes on the company's intangible property and was for the privilege of using the public domain.

In 1936 the case of *Fisher's Blend Station* v. *Tax Commission of State of Washington*, 297 U. S. 650, according to Mr. Justice STONE who spoke for a unanimous Court, presented, page 651:

> "the question whether a state occupation tax, measured by the gross receipts from radio broadcasting from stations within the state, is an unconstitutional burden on interstate commerce."

After reversing the holding of the State Supreme Court that the gross receipts of a radio broadcasting station were derived from intrastate commerce, this Court said, page 655:

> "As appellant's income is derived from interstate commerce, the tax, measured by appellant's gross income, is of a type which has long been held to be an unconstitutional burden on interstate commerce."

The following year, 1937, saw the introduction of what might be called the "modern era" in the realm of the interpretation of the Commerce Clause and its application to state taxation. In *Puget Sound* v. *Tax Commission*, 302 U. S. 90, the State of Washington levied for the privilege of engaging in business activities within the state a tax equal to ½ of 1% of the gross income of the business. This tax had been applied to the appellant, a stevedoring company whom the Court found to be engaged in interstate and foreign commerce. Mr. Justice CARDOZO spoke for a unanimous Court, when he stated at page 94:

> "The business of loading and unloading being interstate or foreign commerce, the State of Washington is not at liberty to tax the privilege of doing it by exacting in return therefor a percentage of the gross receipts. Decisions to that effect are many and controlling."

Mr. Justice CARDOZO did not look for any other reason on which to base this opinion. He did not consider whether this tax would burden commerce by virtue of being duplicated elsewhere. He did not inquire whether it was apportioned. He did not consider the matter pertinent and necessary to a decision in the case. The tax was a privilege tax on gross receipts derived from interstate transportation and for that reason was invalid.

We come now to the year 1946, and the decision in *Freeman* v. *Hewit,* 329 U. S. 249, the language of which we have already quoted at some length in its delineation of our problem. We are ready now to consider its conclusion. The case, like *Adams* v. *Storen,* 304 U. S. 307, involved the Indiana gross receipts tax and again the tax was applied to the gross receipts from a sale of property to a buyer outside the state. The facts therefore are not as strong as in the case at bar where the gross receipts being taxed are derived from the actual transportation of the goods. The reasoning of Mr. Justice FRANKFURTER, however, is just that much more valid in our case. At 329 U. S. 254 he holds it immaterial that the tax affects interstate and intrastate business alike:

> "It has been suggested that such a tax is valid when a similar tax is placed on local trade, and a specious appearance of fairness is sought to be imparted by the argument that interstate commerce should not be favored at the expense of local trade. So to argue is to disregard the life of the Commerce Clause. Of

course a state is not required to give active advantage to interstate trade. But it cannot aim to control that trade even though it desires to control its own. It cannot justify what amounts to a levy upon the very process of commerce across state lines by pointing to a similar hobble on its local trade. * * * But the fact of such a tax, in any event, puts impediments upon the currents of commerce across the state line, while the aim of the Commerce Clause was precisely to prevent states from exacting toll from those engaged in national commerce. The Commerce Clause does not involve an exercise in the logic of empty categories. It operates within the framework of our federal scheme and with due regard to the national experience reflected by the decisions of this Court, even though the terms in which these decisions have been cast may have varied."

After describing some of the taxes which Indiana could exact against the seller, Mr. Justice FRANKFURTER continues, at page 256:

"While these permitted taxes may, in an ultimate sense, come out of interstate commerce, they are not, as would be a tax on gross receipts, a direct imposition on that very freedom of commercial flow which for more than a hundred and fifty year has been the ward of the Commerce Clause."

Mr. Justice FRANKFURTER then dismisses the contention that to hold a state tax invalid, duplication of the tax by other states must be shown, with the following language, page 256:

"It is suggested, however, that the validity of a gross sales tax should depend on whether another state has also sought to impose its burden on the transactions. If another state has taxed the same interstate transaction, the burdensome consequences to interstate trade are undeniable. But that, for the time being, only

one state has taxed is irrelevant to the kind of freedom of trade which the Commerce Clause generated. The immunities implicit in the Commerce Clause and the potential taxing power of a state can hardly be made to depend, in the world of practical affairs, on the shifting incidence of the varying tax laws of the various states at a particular moment. * * * Nor is there any warrant in the constitutional principles heretofore applied by this Court to support the notion that a state may be allowed one single-tax-worth of direct interference with the free flow of commerce. An exaction by a state from interstate commerce falls not because of a proven increase in the cost of the product. *What makes the tax invalid is the fact that there is interference by a state with the freedom of interstate commerce.*" (Emphasis supplied.)

In March, 1947, this Court was again confronted with a gross receipts tax in the twin cases of *Joseph* v. *Carter & Weekes Stevedoring Co.* and *Joseph* v. *John T. Clark & Son*, 330 U. S. 422. The tax there involved was levied by New York City "for the privilege of carrying on * * * any trade, business" and was "equal to one-tenth of one percentum upon all receipts received in and/or allocable to the city from such" trade or business. The Court followed the *Puget Sound* case in holding that the business of appellees was interstate commerce. Mr. Justice REED, writing the opinion of the Court, then states that the tax is invalid in the following language, page 433:

"Although state laws do not discriminate against interstate commerce or in actuality or by possibility subject it to the cumulative burden of multiple levies, those laws may be unconstitutional because they burden or interfere with commerce. * * * Stevedoring, we conclude, is essentially a part of the commerce itself and therefore a tax upon its gross receipts or upon the privilege of conducting the business of stevedoring for

interstate and foreign commerce, measured by those gross receipts, is invalid. We reaffirm the rule of *Puget Sound Stevedoring Company.*"

We come now to, as far as we have been able to ascertain, the last case decided by this Court involving a gross receipts tax, *Central Greyhound Lines v. Mealey*, 92 L. ed. (Adv. Sheets) 1235, decided in June, 1948. That case involved a New York "tax on appellant's gross receipts from transportation between points within the state but over routes that utilize the highways of Pennsylvania and New Jersey." The state sought to levy the tax on the unapportioned receipts of appellant from this transportation. The New York Court of Appeals held that the transportation in question was intrastate commerce and therefore that the tax was valid. Mr. Justice FRANKFURTER, writing the opinion of this Court, reversed the state court, holding that the transportation was interstate and that the unapportioned tax on gross receipts must fall. Mr. Justice FRANKFURTER writes, 92 L. ed. (Adv. Sheets), page 1241:

> "By its very nature an unapportioned gross receipts tax makes interstate transportation bear more than 'a fair share of the cost of the local government whose protection it enjoys.' * * * The vice of such a tax is that it lays 'a direct burden upon every transaction in (interstate) commerce by withholding, for the use of the state, a part of every dollar received in such transactions'."

Mr. Justice FRANKFURTER then goes on in his opinion to suggest that if the state authorities should seek to apportion the receipts on some basis such as the mileage within the state and then levy a tax on such apportioned gross receipts that it might be constitutional. The question before the Court was one of an unapportioned tax, so this

case is not authority for sustaining an apportioned gross receipts tax.

Now that we have scrutinized and surveyed and examined the lines drawn by the court in its interpretation of the problem of taxation by the states under the Commerce Clause what conclusions may be drawn? For one thing, we have found that there are almost as many rules as there are cases. This we might have suspected from the language of Mr. Justice FRANKFURTER in *Freeman* v. *Hewit*, 329 U. S. 249, quoted at the start of the argument in this brief. It is remarkable, in view of this fact, that we find such unanimity of opinion on the doctrine that the states cannot levy a tax on gross receipts derived from interstate commerce. This doctrine, practically in this unqualified form, is the law today as emphasized by Mr. Justice CARDOZO in the *Puget Sound* case and as reaffirmed by Mr. Justice REED in the *Carter & Weekes* case. In over 100 years of jurisprudence the only qualification that has been placed on this doctrine is that such a tax may be enacted in lieu of property taxes, *Cudahy Packing Co.* v. *Minnesota*, 246 U. S. 450; and *Wisconsin & M. R. Co.* v. *Powers*, 191 U. S. 379. Outside of that qualification the only cases, out of the great mass of cases on the subject, which have ever questioned or qualified this doctrine are *Philadelphia & Reading R. Co.* v. *Pennsylvania*, 82 U. S. 284, which was emphatically denounced in what became the leading case on this doctrine *Philadelphia & S. M. S. S. Co.* v. *Pennsylvania; Maine* v. *Grand Trunk*, which has been discussed at some length in this brief, and which tried to create a distinction between a tax on gross receipts and a franchise tax measured by gross receipts; and *Central Greyhound Lines* v. *Mealey*, which did not qualify the rule, but indicated that if a gross receipts tax were apportioned it might be approved. On the other hand such

cases as *McGoldrick* v. *Berwind-White* and *Memphis Natural Gas Co.* v. *Stone* in holding other types of tax valid have gone out of their way to state that taxes on gross receipts are invalid or to distinguish the tax involved in their particular case from a gross receipts tax in order to justify it. When we restrict our doctrine to the field of *privilege* taxes measured by gross receipts, we find no qualifications to the court's pronouncement of invalidity. The *Cudahy Packing Co. case* and *Wisconsin & M. R. Co.* case were not privilege taxes, but were gross receipts taxes in lieu of property taxes. The *Grand Trunk* case in its interpretation and explanation by later decisions of this Court if not in origination is also a tax on intangibles or "going concern" value measured by gross receipts and not a privilege tax. No where in the decision of the *Central Greyhound* case is the tax there identified as a privilege tax. If it were so identified the case on its facts could still be distinguished from the case at bar. The tax might be exacted in *Central Greyhound* for the privilege of using the highways. In the case at bar the appellant buys its own right of way and builds and maintains its own transportation medium.

Let us look now at the reasoning and logic back of the lines which have been drawn by the court in its attempt to reconcile the local need for revenue and the "overruling requirement of freedom for the national commerce," *Freeman* v. *Hewit*, 329 U. S. 249. At the risk of oversimplification of the problem, we believe the general principles can be stated very briefly. This Court has repeatedly held that a tax is not void merely because it affects or burdens interstate commerce. A tax is void only if it directly burdens such commerce, or, where the burden is indirect, if it discriminates against or obstructs interstate commerce. To get to the basis for this interpretation by the Court, we must

go back to the writing of the Constitution itself and to the purpose of the Commerce Clause. As Mr. Justice REED put it in *Joseph* v. *Carter & Weekes*, 330 U. S. 422, 426:

> "It is trite to repeat that the want of power in the confederation to regulate commerce was a principal reason for the adoption of the Constitution."

This fact accounted for Mr. Chief Justice MARSHALL's opinion in *Gibbons* v. *Ogden*, 22 U. S. 1, that the Constitution vested exclusive jurisdiction over interstate commerce in Congress. This doctrine which has become axiomatic was well stated by Mr. Justice RUTLEDGE in his concurring opinion in *Freeman* v. *Hewit*, 329 U. S. 249, 263, as follows:

> "I agree that the Commerce Clause 'of its own force' places restrictions upon state power to tax, as well as to regulate, interstate commerce."

As Mr. Justice DOUGLAS put it in *Richfield Oil Corp.* v. *State Board*, 329 U. S. 69, 75:

> "It is well established that the Commerce Clause is a limitation upon the power of the states, even in absence of action by Congress."

But as we have seen this Court has qualified the broad implications of Mr. Chief Justice MARSHALL's doctrine. It has permitted state taxation and state regulation of interstate commerce as long as the taxation or regulation is not an interference with or a direct burden on interstate commerce. As additional cases have been decided, each on its own facts, the scope of the states' power to tax has been inevitably increased. This Court not wanting to cripple or hamper the states unnecessarily in their search for revenue and feeling that interstate commerce should bear its fair share of the cost of local government has endeavored wherever possible to sustain the state tax. But the Court has continued to invalidate those taxes, to borrow the lan-

guage of Mr. Justice DOUGLAS in *Richfield Oil Corp.* v. *State Board, supra*, page 76:

> "which discriminate against interstate commerce, which impose a levy for the privilege of doing it, which place an undue burden on it."

This summation of the field closed to state taxation shows the degree to which it has shrunk. Outside of taxes which are discriminatory and would therefore be invalid under the Due Process Clause even if there were no Commerce Clause, there are very few types of tax which the states cannot levy under present jurisprudence. The most important class of taxes which are now considered invalid are taxes for the privilege of conducting interstate commerce, whether based on a flat fee, based on some apportioned formula, or based on gross receipts. The tax in the case at bar is defined by the Supreme Court of Mississippi as a privilege tax for operating a pipe line for the transportation of oil and it is based on the gross receipts from that transportation. Surely no tax the state could impose and no regulation they could promulgate would more completely affect or burden interstate commerce than this tax. It is no wonder this Court has steadfastly held that privilege taxes based on gross receipts from interstate commerce are invalid. In the first place all gross receipt taxes are invalid under existing law. Such taxes are invalid because they place an undue burden on the commerce in that they are so closely associated with the commerce that a tax on gross receipts is actually a tax on the commerce itself. When the gross receipts are derived not from sales, as in *Freeman* v. *Hewit*, 329 U. S. 249, but from the actual transportation services as in the present case, the argument against their taxation is considerably strengthened. In the second place taxes on the privilege of engaging in interstate com-

merce have been uniformly rejected by this Court. When a state requires a tax for the privilege of conducting a business, it has the power of life or death over that business. Unless the business complies, it cannot operate. If the state raises the tax beyond the ability of the business to pay, it may wipe out the business. Such a tax represents regulation in its most virulent form. In this case we have a privilege tax measured by gross receipts. If the Commerce Clause is to continue to have any meaning in the realm of state taxation, unless all this existing jurisprudence is to be thrown overboard, if any type of state taxation is to be held invalid under the Commerce Clause, the present privilege tax on the gross receipts derived from interstate transportation must be invalidated.

2. *Even if the State has the power in general to levy a privilege tax based on the gross receipts derived from interstate commerce, a tax in this case is unconstitutional and a burden on interstate commerce because it is not apportioned and it is discriminatory.*

a. The tax in this case is not apportioned:

The only two cases of this Court in which we have found an indication that state taxes measured by gross receipts from interstate commerce might be sustained are the previously discussed cases of *Maine* v. *Grand Trunk;* 142 U. S. 217, (1891) and the recent case of *Central Greyhound Lines, Inc.* v. *Mealey,* 92 L. ed. (Adv. Sheets) 1235. The former case involving a franchise tax measured by gross receipts has been distinguished by this Court both in the decision itself and in the later decision of *Galveston H. & S. A. Ry. Co.* v. *Texas,* 210 U. S. 217, from a direct tax on the privilege of engaging in interstate commerce measured by gross receipts derived therefrom which is here involved. In the latter case the State of New York was denied the

right to tax the gross receipts from transportation by bus from New York City to Albany, New York, *via* a route of which 57.47% lay within the State of New York and 42.53% lay within the states of New Jersey and Pennsylvania. However, Mr. Justice FRANKFURTER indicated that the tax might be sustained on receipts from transportation apportioned as to mileage within the State of New York. This Court will note that in the instant case no apportionment has been made of the tax sought to be collected by the State of Mississippi on the basis of mileage or any other proper or equitable basis. What the Mississippi statute has done under the interpretation of the Tax Commission and what the Supreme Court of that state has affirmed is a segregation of a continuous interstate movement from producing lease tanks to final destination into two arbitrary segments. One part the transportation from lease tanks to railroad tank cars performed by appellant it has treated as intrastate commerce and subjected the gross receipts therefrom to the full two per cent tax. The remainder of the movement from appellant's loading racks to out of state destination performed by the railroads it has admittedly exempted from the tax entirely even though a part of the mileage transported by said railroad carriers lay within and a part of the transportation services rendered by those carriers was performed within the State of Mississippi. Even if we should admit for the sake of argument that the Mississippi statute might have constitutionally imposed a tax on the mileage proportion of the revenue earned from the complete interstate movement, the statute does not so provide but as interpreted by the Mississippi Supreme Court would levy an arbitrary exaction on the gross receipts of those carriers whose lines begin and end within the state while exempting from tax the Mississippi portion of

movements by other connecting carriers which transport the same shipments from the point of loading within the State of Mississippi to destinations outside the state. Such application of the tax to revenue from portions of interstate transportation by one carrier within the state while exempting revenue from other portions of the same shipments likewise moved by other common carriers within the state, is arbitrary and an unreasonable burden on interstate transportation by the short haul carrier whose lines lie entirely within the State of Mississippi. As Mr. Justice FRANKFURTER aptly stated in the *Central Greyhound Lines* case, 92 L. ed. (Adv. Sheets) 1235, 1239:

> "The kind of confusion to which the *Lehigh Valley* opinion has given rise results from employing a needless fiction—calling commerce local which in fact is interstate—as a manner of stating that a particular exercise of state power is not invalid even though it affects interstate commerce. The difficult task of determining whether a phase of commerce concededly interstate is subject to a particular incidence of state regulation, through taxation or otherwise, is not lessened by calling interstate commerce local commerce in order to sustain its local control."

With all due respect to the Mississippi Supreme Court we are convinced that in its decision of this case it has fallen into the very error that was referred to by Mr. Justice FRANKFURTER above. It has misconstrued as a local transportation movement entirely subject to state taxation, what is obviously a part of an interstate movement subject to tax if at all only on the portion reasonably apportioned to the State of Mississippi. The tariff collected by the appellant for its part of the interstate movement bears no reasonable relationship to the mileage proportion of the charge for the entire interstate shipment such as was re-

ferred to in the *Central Greyhound Lines, Inc.*, case. This Court in the case of *Joseph v. Carter & Weekes Stevedoring Co.*, 330 U. S. 422, had occasion to consider the application of a local tax to the gross receipts from the portion of an interstate transportation service performed within the boundaries of the taxing district. There the City of New York sought to impose a privilege tax on the business of loading and unloading steamships within New York harbor. In the majority opinion, Mr. Justice REED commented on the apportionment question as follows, at page 427:

> "From the Commerce Clause itself, there comes, also, an abridgment of the state's power to tax within its territorial limits. This has arisen from long continued judicial interpretation that, without congressional action, the words themselves of the Commerce Clause forbid undue interferences by the states with interstate commerce and that this rule applies in full force to an unapportioned tax on the gross proceeds from interstate business, where the taxes were not in lieu of ad valorem taxes on property. We do not think that a tax on gross income from stevedoring, obviously a 'continuation of the transportation,' is a tax apportioned to income derived from activities within the taxing state. The transportation in commerce, at the least, begins with loading and ends with unloading. Loading and unloading has effect on transportation outside the taxing state because those activities are not only preliminary to but are an essential part of the safety and convenience of the transportation itself."

We submit that the revenue from gathering of crude oil from the producing lease tanks in the instant case, its transportation to railroad loading racks and its loading aboard tank cars for continuous transportation outside the state in interstate commerce, like the revenue from stevedoring services in the *Carter & Weekes* case, cannot be prop-

y considered as segregated and apportioned to the local
ing district where the services were performed.

b. The tax in this case is discriminatory regulation:

The Mississippi statute as applied to appellant in this
e is arbitrary and discriminatory in its effect on appel-
t and its competitors transporting oil from points of
gin in Mississippi to destinations outside the state. A
mpetitive pipe line company may install gathering systems
the same fields now served by appellant and under the
plication given this statute if said gathering systems are
nected to interstate trunk lines and shipments are made
m lease tanks to out of state destinations entirely by pipe
e the gross receipts from the *entire shipment from origin
destination,* including the gathering service identical to
t performed by appellant herein are construed to be
mpt from taxation as interstate commerce. Similarly a
mmon carrier by railroad may, under the interpretation
en this statute by the Mississippi courts, construct a
r track into a producing oil field served by appellant's
hering system and ship oil by rail from the producer's
se tanks to the same out of state destination without
ng subject to the imposition of this tax upon either the
l from the field to the main line or the haul from the
ction of the spur via the main line to out of state desti-
ion. We submit that such classification is entirely arbi-
ry and capricious and a tax levied on such basis is a
crimination against and a burden upon appellant's in-
tate business. The decision of the Mississippi Supreme
rt holds that such discrimination was not accidental or
idental but was intended by the Legislature in its enact-
nt of the statute. The court says (35 So. (2d) 77; Tr. 50):

"it was known that all of the oil transported by pipe

line from producing leases or elsewhere would be transported to destinations outside the state either by interstate trunk pipe lines, on a continuous journey, or likewise by railroad from local shipping points within the state. If by the former method, it would of course constitute that character of commerce 'which the State of Mississippi is prohibited from taxing under the Constitution of the United States' and this would be equally true as to the movement by rail of oil from a local shipping point to its destination outside the state in crossing the state line. Hence, the statute was designed only for the purpose of taxing the privilege of operating a pipe line for transporting the oil from one point to another in the state where it is then delivered to an interstate carrier prior to the beginning of its ultimate passage to a foreign state in interstate commerce. Most assuredly, no pipe line company would be deemed justified in installing an oil gathering system to transport oil other than that destined for ultimate interstate shipment, there being no oil refineries here."

The tax here in question, as applied by the State of Mississippi, is also discriminatory in that if sustained it may be duplicated or multiplied by the imposition of similar taxes on the unloadng of the oil by the state or district in which it is unloaded from tank cars and piped to the terminal or refinery for reshipment or further processing. Thus, to the two per cent sought to be collected here on the gathering and loading of interstate shipments might be added a like imposition on the unloading at destination. Mr. Justice Reed in the majority opinion in *Joseph* v. *Carter & Weekes*, 330 U. S. 422, 429, summarized the rule with respect to multiple burdens on interstate commerce as follows:

> "A power in a state to tax interstate commerce or its gross proceeds, unhampered by the Commerce Clause, would permit a multiple burden upon that commerce. This has been noted as ground for their invali-

dation. *Western Live Stock* v. *Bureau*, 303 U. S. 250; 255 * * *. The selection of an intrastate incident as the taxable event actually carries a similar threat to the commerce but, where the taxable event is considered sufficiently disjoined from the commerce, it is thought to be a permissible state levy. This result generally is reached because the local incident selected is one that is essentially local and is not repeated in each taxing unit. In the present case, the threat of a multiple burden, except in the few instances in the record of interstate, in distinction to foreign, commerce, is absent. The multiple burden on interstate transportation from taxation of the gross receipts from stevedoring arises from the possibility of a similar tax for unloading."

When it is considered that the statute as construed applies only to shipments by combination of pipe line and railroad while exempting completely all-rail and all-pipe-line movements the discriminatory effect on the combination type of interstate transportation here involved is readily apparent.

The foregoing rules with respect to constitutional limitations on the power of state governments to levy privilege taxes on the gross receipts from interstate commerce apply where the Congress has not preempted the regulation of such commerce. They apply with even more force when, as here, the Congress has specifically designated to a federal agency the regulation of the particular type of business involved. The Interstate Commerce Act, as amended June 29, 1906, and as set out in 49 U. S. C. A. 1, provides for regulation of interstate transportation as follows:

"(1) the provisions of this chapter shall apply to common carriers engaged in * * *

(b) the transportation of oil or other commodity, except water and except natural or arti-

ficial gas, by pipe line or *partly by pipe line and partly by railroad* or by water." (Italics ours.)

Congress having provided for federal regulation of common carriers engaged in interstate transportation of oil partly by pipe line and partly by rail, the precise method here involved, the State of Mississippi is without power to regulate these operations whether by direct control or by the equally effective means of taxation. Since the State of Mississippi cannot directly regulate the rates for this business which are solely within the jurisdiction of the Interstate Commerce Commission it may not through discriminatory taxation as here sought to be applied, place interstate carriers at a disadvantage with their intrastate competitors or with other types of interstate transportation with which they are required to compete for business. Such power would, if permitted, allow the State of Mississippi through taxation to usurp the powers delegated by the Congress to the Interstate Commerce Commission to prescribe rates and enforce rules and regulations governing the operations of competitive carriers engaged in transportation of crude oil from Mississippi to destinations outside the state in interstate commerce. This is the type of state obstruction which we believe the Commerce Clause of the Constitution was designed to prevent and which this Court has repeatedly and consistently held it does prohibit.

Conclusion.

The Supreme Court of Mississippi has found that the Mississippi privilege tax levied on "every person engaging * * * in the business of operating a pipe line for transporting from one point to another in this state oil" computed at 2% of "the gross income of the business" applies to the particular activities of this appellant which are involved

herein. These activities consist of gathering oil at lease tanks, transporting it to storage tanks near a railroad siding, and then as fast as the railroad spots its tank cars, loading said oil aboard said cars for shipment out of the state. This oil is tendered to appellant as a common carrier "for transportation to destination named herein, for interstate shipment beyond" and is handled under tariffs filed with the Interstate Commerce Commission. The Mississippi Court based its decision that these activities were subject to the tax on the theory that "this pipe line company was an intrastate carrier." (Tr. 50)

Appellant respectfully submits that the Supreme Court of Mississippi erred in so holding for the reasons that: (*1*) The activities described are in fact a part of interstate commerce, and (*2*) a tax on the privilege of conducting interstate transportation, based on the gross receipts derived therefrom is invalid under the Commerce Clause.

The Supreme Court of Mississippi seemed to base its opinion that appellant was an "intrastate carrier" on the theory that appellant's movement of the oil was merely in preparation for export, "a mere transfer of the property to a depot" (Tr. 51). The court did not recognize that appellant is a common carrier. The court admits in its opinion that if the railroad had built a spur in to each lease tank or if the appellant's gathering lines had connected to a trunk pipe line, that the interstate movement would have started at the lease tanks. We have compared those situations with the facts in this case and have failed to discover any valid distinction which would make appellant an "intrastate carrier."

No valid argument nor jurisprudence is known to appellant to support the contention that the activities herein

were part of intrastate commerce. On the other hand appellant has shown that the activities in question meet all the requirements and tests which have been laid down by this Court for a determination of interstate commerce. The facts show oil tendered by its owner to a common carrier for shipment out of the state. There can be no question that the owner intends to ship the oil out of the state at the time of commitment to the appellant. Oil to become useful must be refined and the Mississippi Supreme Court in its opinion (Tr. 50) finds there are "no refineries here" (in Mississippi). Certainly then when the owner commits the oil to a common carrier with intent to ship it out of the state, the movement has the essential character of interstate commerce, and interstate transportation at that moment commences. Once this stream of commerce has been set in motion there is, in this case, no interruption in it. There is continuity of movement from the moment when the appellant takes possession until the oil is delivered at its final destinations beyond the state line. Any stoppage in transit was only that necessary to transfer the oil from one mode of transportation to another. The Mississippi Court has conceded in its opinion that there was no interruption in the continuity of the movement. Appellant has presented ample authority in support of all its contentions in establishing that the operations involved herein are without question a part of interstate commerce.

Once the determination is made that the transportation herein is interstate commerce, it must be decided whether or not a state has the power to levy a privilege tax based on the gross receipts derived from interstate commerce for the privilege of engaging in such commerce. We have quoted a statement of Mr. Justice Douglas of the present court (329 U. S. 69, 76) that a tax levied for the privilege of doing

interstate business is one of the types of state taxation which has been consistently invalidated by this Court. We have cited cases decided from 1868 to the last term of the Court supporting Mr. Justice DOUGLAS' statement. These cases hold that to allow a state to tax the privilege of engaging in interstate commerce would be to open the door to that very type of interference with interstate commerce which the Federal Constitution was framed to prevent. In addition to the privilege tax cases, we have cited an unbroken line of authority extending from 1887 to the present time holding that state taxes based on gross receipts derived from interstate transportation unless in lieu of property taxation, are invalid. These cases hold that such taxes are so closely tied in to the commerce and are such a direct burden upon it, that if a state has the power to levy such a tax, it has the power to tax interstate commerce out of existence. As has been frequently pointed out, it makes no difference that the same tax is laid on intrastate commerce and that the state would also be taxing its own intrastate commerce out of existence, for it has the right, if it so desires, to do that. But to permit a state to tax interstate commerce to the point of choking it off is certainly to allow interference with such commerce beyond the point allowable under the Commerce Clause. But even if taxes on the privilege of engaging in interstate commerce based on the gross receipts therefrom were permissible, we have seen that the present tax is invalid for the additional reason that it is unapportioned. We have also seen that if permitted, this particular tax would discriminate against the particular type of transportation herein involved. For these reasons we believe that the tax statute herein, as construed and applied to this appellant, must be invalidated unless this Court wishes to specifically overrule many of the cases cited in

Part B of our argument including particularly *Puget Sound Stevedoring Co.* v. *Tax Comm.*, 302 U. S. 90, and *Joseph* v. *Carter & Weeks Stevedoring Co.*, 330 U. S. 422.

Since the Supreme Court of Mississippi has found that the Mississippi privilege tax based on gross receipts is applicable to the activities of this appellant and since those activities are in fact interstate commerce, the statute in question as applied to this appellant is invalid under the Commerce Clause of the Federal Constitution.

For this reason the appellant respectfully prays that the Honorable Court will reverse the judgment of the Supreme Court of Mississippi in so far as that judgment sustained the validity of the tax collected from this appellant and allow appellant to recover from appellee the sum of $20,296.36, which has been paid under protest, together with interest and costs for refund of which this suit was brought, and to recovery of which appellant is justly entitled.

Respectfully submitted,

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A copy of the above and foregoing brief for appellant has been mailed, postpaid, to J. H. Sumrall, attorney for A. H. Stone, Chairman State Tax Commission, Appellee, this ... day of December, 1948.

....,
Of Counsel for Appellant.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

287

No. 287

INTERSTATE OIL PIPE LINE COMPANY,
Appellant,

vs.

A. H. STONE, CHAIRMAN STATE TAX COMMISSION.

APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSISSIPPI

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

J. H. SUMRALL,
Counsel for Appellee.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 287

INTERSTATE OIL PIPE LINE COMPANY,
Appellant,

vs.

A. H. STONE, CHAIRMAN STATE TAX COMMISSION,
Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSISSIPPI

STATEMENT OF APPELLEE AGAINST JURISDICTION AND MOTION TO DISMISS OR AFFIRM

This is an appeal from the decision rendered by the Supreme Court of Mississippi on April 26, 1948, reported in 35 So. 2d at page 73.

The case involves the liability of a foreign corporation for the tax imposed upon the exercise of the privilege taxed by Section 2-d of Chapter 119 of the Laws of 1934, being Section 10109 of the Mississippi Code of 1942. The particular part of said section involved in this controversy being the provision for the imposition of the tax on every person engaging or continuing in this state in the business of operating a pipe line for transporting from one point to

another in this state of oil or natural gas, or artificial gas, through pipes or conduits in this state.

The tax demanded and collected by the appellee, as Commissioner, clothed with the authority and charged with the duty of administering the law in question, was on the basis of two per cent of the gross income of the business, the compensation being received only on the basis of the number of miles within the state that the oil was transported, the charge for such services being definitely fixed at so much per barrel of oil transported, according to the number of miles within the state that the oil was transported. The sole contention of the appellant in the original objection to the demand for said tax, first before the Tax Commission on the hearing granted, in the Circuit Court of Hinds County, in which the case was tried under the proceeding provided by statute, in the nature of a suit against the Commissioner for the recovery of the tax paid, and in the Supreme Court of Mississippi, was based on the provision in said section of the law:

> There shall be excepted from the gross income used in determining the measure of the tax imposed in this section so much thereof as is derived from business conducted in commerce between this State and other States of the United States, or between this State and foreign countries which the State of Mississippi is prohibited from taxing under the Constitution of the United States of America."

In the Agreed Statement of Facts upon which this case was tried in the Circuit Court of Hinds County, Mississippi, the following language appears:

> "The amount of sales tax demanded by the Commissioner and paid by the Company, and which it is sought to recover by this suit, was computed only upon the amount of compensation received by the Company for transporting oil or petroleum products from the places

of production in the State to the places in the State where deliveries were made to a railroad or other common carrier for transportation out of the State. And did not include any compensation received by the Company for transportation beyond the boundaries of the State."

It was on the basis of this Agreed Statement of Facts that the Court concluded that the activity of the appellant for which the compensation was received, being wholly within the State of Mississippi, and the further fact that the appellant had no contractual relation with any other transportation company for a continuous movement of the commodity when first accepted by the appellant, does not constitute such a part of the interstate movement, as to permit the exemption contained in the statute to apply to this activity. The sole contact of the appellant with the interstate carrier which ultimately moved the commodity out of the state being as agent for the shipper. The Bill of Lading obtained being in the name of the shipper and the owner of the oil, as consignor, and naming the consignee outside of the state to whom the owner consigned the oil. The delivery to an interstate carrier being made through the agency of the appellant, who performed said service wholly through local activity. The Supreme Court of Mississippi held that the appellant was not engaged in interstate commerce. And it also held that for that reason the language of the statute by which an exemption was granted from the tax did not apply.

The Questions Involved Are Not Substantial

The facts in the case are so clear, and the meaning of the language of the statute involved is too plain to give rise to any question to be decided by this Court, since the tax involved is an Excise tax and does not partake of the nature of a property or ad valorem tax, the imposition of which is

dealt with in most of the cases relied upon by the appellant in support of its contention.

The Supreme Court of Mississippi held that under the admitted facts that the movement of the oil transported by the appellant was clearly in preparation for its interstate transportation, and that the mere transfer of the property to the loading ramp or depot within the state from which the transportation or journey to interstate was to begin, was not a part of that transportation so as to exempt the appellant from State taxation on the ground that it would be an interference with, or burden upon interstate commerce.

In support of the holding of the Mississippi Court, it cited cases establishing the modern trend of the decisions of this Court in holding that even taxation of interstate commerce is not prohibited where it is shown that the result of the tax is not burdensome and does not attempt to regulate or control interstate commerce. The cases cited by the Supreme Court of Mississippi being *McGoldrick* v. *Berwind-White Coal Mining Company*, 309 U. S., 33, 60 S. Ct. 388, 84 L. Ed. 565; *Interstate Natural Gas Company* v. *Stone*, 308 U. S. 522, 60 S. Ct., 292, 84 L. Ed., 442, and other cases.

There are many other cases cited by the Mississippi Court which bear on the opinion, which is part of the record in this case, and I shall not therefore burden the Court by enumerating said cases. But I respectfully call this Court's attention to the language used by this Court in the case of *Memphis Natural Gas Company* v. *Stone*, decided by this Court on June 21, 1948, reported in Advance Sheet Number 16, Volume 68 of the Supreme Court Reporter, at page 1475, the specific language referred to being:

> "As we are bound by the construction of the State statute by the State Court it is idle to suggest that the

tax is on 'the privilege of engaging in interstate business'."

And further:

"This tax is not an unapportioned tax on gross receipts from the commerce itself . . . It cannot be duplicated in other states . . . If it was intended to say that such in-the-state activities as there described could not be taxed, we disagree with that conclusion."

And further:

"This is a tax on activities for which the State, not the United States, gives protection and the State is entitled to compensation when its tax cannot be said to be an unreasonable burden or a toll on the interstate business."

Other authorities relied upon by the appellee in support of its contention that the appellant was not engaged in Interstate Commerce, are the Mississippi case of *Chassaniol* v. *City of Greenwood*, 166 Miss. 848, which was affirmed by the Supreme Court of the United States in 280 U. S., page 390; *Jersey Central Power & Light Company* v. *Federal Power Commission*, 319 U. S. 61; *New York Ex Rel Pennsylvania Railroad Company* v. *Knight*, 192 U. S., 21, 48 L. Ed. 325, 24 S. Ct. Reporter 202; and *United States of America* v. *Yellow Cab Company, Et al*, 332 U. S. 218-234; 91 L. Ed. 2010.

The Construction of a State Statute by the Highest Court of the State Is Binding on the Supreme Court of the United States.

It is a well settled principle of law, that has not only been adhered to by this Court for a long period of time, but which is still adhered to by this Court, that the construction of a State statute by the highest court of the State is binding on this Court.

Among the many cases in which this rule has been announced are *Supreme Lodge Knights of Pythias* v. *Myer*, 265 U. S., 30-32-33; *Hicklin* v. *Coney*, 290 U. S. 169-172; *Hartford Accident and Investment Company* v. *Nelson Manufacturing Company*, 291 U. S., 352-358; *Moorhead* v. *New York Ex Rel Tipaldo*, 298 U. S., 587, 80 L. Ed., 1347; *Senn* v. *Tile Layers Protective Union*, 301 U. S. 468, 81 L. Ed, 1229; *Allen Bradley Local* v. *Wisconsin Employment Relations Board*, 315 U. S. 740-751, 86 L. Ed. 802; *General Trading Company* v. *State Tax Commission*, 332 U. S., 355, 88 L. Ed. 1309; and *Independent Warehouse* v. *Scheele*, 331 U. S., page 70.

The Supreme Court of Mississippi having definitely construed the statute involved under the facts admitted, to not only deny the contention of the appellant that it was engaged in interstate commerce, and as a consequence, the exemption provision relied upon by the appellant could not apply, then the questions presented to this Court are so unsubstantial as not to need further argument or comment.

Therefore, the appellee moves this Court to dismiss the appeal, or affirm the judgment herein appealed from.

Respectfully submitted,

ALF H. STONE, CHAIRMAN,
State Tax Commission of Mississippi,
Appellee;

J. H. SUMRALL,
Attorney for the Appellee.

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SUPREME COURT, U.S.

NO. 287

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

INTERSTATE OIL PIPE LINE COMPANY,
Appellant,

vs.

A. H. STONE, CHAIRMAN STATE TAX COMMISSION,
Appellee

APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSISSIPPI

BRIEF FOR APPELLEE

J. H. SUMRALL, Attorney for Appellee

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INTERSTATE OIL PIPE LINE COMPANY,

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vs.

A. H. STONE, CHAIRMAN STATE TAX COMMISSION,

Appellee

APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSISSIPPI

BRIEF FOR APPELLEE

STATEMENT OF THE CASE

This is an appeal from the decision rendered by the Supreme Court of Mississippi on April 26, 1948, reported in 35 So. 2d at page 73.

The case involves the liability of a foreign corporation for the tax imposed upon the exercise of the privilege taxed by Section 2-d of Chapter 119 of the Laws of 1934, being Section 10109 of the Mississippi Code of 1942. The particular part of said section involved in this controversy being the provision for the imposition of the tax on every person engaging or continuing in this state in the business of operating a pipe line for transporting from one point to another in this state of oil or natural gas, or artificial gas, through pipes or conduits in this state.

The statute imposing the tax which was demanded by the Commissioner and paid by the appellant is as follows:

(Para. 7 of Chapter 1010 of the Mississippi Code of 1942).

> "Upon every person engaging or continuing within this state in the business of operating a pipe line for transporting for compensation or hire from one point to another in this state oil or natural gas or artificial gas through pipes or conduits in this state, there is likewise hereby levied and shall be collected a tax, on account of the business engaged in, equal to two per cent of the gross income of the business."

The tax demanded and collected by the appellee, as Commissioner, clothed with the authority and charged with the duty of administering the law in question, was on the basis of two per cent of the gross income of the business, the compensation being received only on the basis of the number of miles within the state that the oil was transported, the charge for such services being definitely fixed at so much per barrel of oil transported, according to the number of miles within the state that the oil was transported. The sole contention of the appellant in the original objection to the demand for said tax, first before the Tax Commission on the hearing granted, in the Circuit Court of Hinds County, in which the case was tried under the proceeding provided by statute, in the nature of a suit against the Commissioner for the recovery of the tax paid, and in the Supreme Court of Mississippi, was based on the provision in said section of the law:

> "There shall be excepted from the gross income used in determining the measure of the tax imposed in this section so much thereof as is derived from

business conducted in commerce between this State and other States of the United States, or between this State and foreign countries which the State of Mississippi is prohibited from taxing under the Constitution of the United States of America."

In the Agreed Statement of Facts upon which this case was tried in the Circuit Court of Hinds County, Mississippi, the following language appears:

> "The amount of sales tax demanded by the Commissioner and paid by the Company, and which it is sought to recover by this suit, was computed only upon the amount of compensation received by the Company for transporting oil or petroleum products from the places of production in the State to the places in the State where deliveries were made to a railroad or other common carrier for transportation out of the State. And did not include any compensation received by the Company for transportation beyond the boundaries of the State."

It was on the basis of this Agreed Statement of Facts that the Court concluded that the activity of the appellant for which the compensation was received, being wholly within the State of Mississippi, and the further fact that the appellant had no contractual relation with any other transportation company for a continuous movenient of the commodity when first accepted by the appellant, does not constitute such a part of the interstate movement as to permit the exemption contained in the statute to apply to this activity. The sole contact of the appellant with the interstate carrier which ultimately moved the commodity out of the state being as agent for the shipper. The Bill of Lading obtained being in the name of the shipper and the owner of the oil as con-

signor, and naming the consignee outside of the state to whom the owner consigned the oil. The delivery to an interstate carrier being made through the agency of the appellant, who performed said service wholly through local activity. The Supreme Court of Mississippi held that the appellant was not engaged in interstate commerce. And it also held that for that reason the language of the statute by which an exemption was granted from the tax did not apply.

STATEMENT OF THE FACTS

The Interstate Oil Pipe Line Company, the appellant herein, when oil was first discovered in Mississippi, and the oil being discovered was not known to be of such quantity as to justify an interstate carrier to build spur tracks or pipe lines into the few small oil fields; but realizing the necessity for some facilities of transporting the oil from the remote scene of production to some interstate carrier to be transported out of the state, undertook to supply these facilities and receive the benefit of the compensation to be received for rendering the service of transporting the oil from the place of production to an interstate carrier which had the facilities for transporting the oil beyond the state line to refineries which were the ultimate purchasers or receivers of such oil.

All of the operations of the appellant which were regarded as subject to tax, and for which the only taxes were paid, and for which recovery was sought in this suit, were imposed upon the activities of the appellant in transporting oil from one place within the state to another place within the state.

As soon as appellant, after realizing that oil development within the state indicated a sufficient volume of oil in numbers of fields from which oil would be pro-

duced, then provided itself with the proper facilities for transporting oil in continuous movement from the place of production in the state to points outside the state without the intervention of separate and distinct interstate carriers to whom oil had been previously delivered, then no further demand was made on the appellant for Sales Tax in connection with its operations within the state, or facilities used within the state employed in transportation of oil from a point within the state to a point without the state. In otherwords, as soon as the appellant constructed trunk pipe lines from points within the state to points beyond the state and actually began the operation of interstate commerce, then no further demand was made on the appellant for taxes on account of such activities, and no such tax is involved in this suit.

ARGUMENT

The Supreme Court of Mississippi held that under the admitted facts that the movement of the oil transported by the appellant was clearly in preparation for its interstate transportation, and that the mere transfer of the property to the loading ramp or depot within the state from which the transportation or journey to interstate was to begin, was not a part of that transportation so as to exempt the appellant from State taxation on the ground that it would be an interference with, or burden upon interstate commerce.

In support of the holding of the Mississippi Court, it cited cases establishing the modern trend of the decisions of this Court in holding that even taxation of interstate commerce is not prohibited where it is shown that the result of the tax is not burdensome and does not attempt to regulate or control interstate commerce. The cases cited by the Supreme Court of Mississippi being Mc-

Goldrick v. Berwind-White Coal Mining Company, 309 U. S., 33, 60 S. Ct. 388, 84 L Ed. 565; Interstate Natural Gas Company v. Stone, 308 U. S. 522, 60 S. Ct., 292, 84 L. Ed., 442, and other cases.

There are many other cases cited by the Mississippi Court which bear on the opinion, which is part of the record in this case, and I shall not therefore burden the Court by enumerating said cases. But I respectfully call this Court's attention to the language used by this Court in the case of Memphis Natural Gas Company v. Stone, decided by this Court on June 21, 1948, reported in Advance Sheet Number 16, Volume 68 of the Supreme Court Reporter, at page 1475, the specific language referred to being:

> "As we are bound by the construction of the State statute by the State Court it is idle to suggest that the tax is on 'the privilege of engaging in interstate business'."

And further

> "This tax is not an unapportioned tax on gross receipts from the commerce itself . . . It cannot be duplicated in other states . . . If it was intended to say that such in-the-state activities as there described could not be taxed, we disagree with that conclusion."

And further

> "This is a tax on activities for which the State, not the United States, gives protection and the State is entitled to compensation when its tax cannot be said to be an unreasonable burden or a toll on the interstate business."

Other authorities relied upon by the appellee in support of its contention that the appellant was not engaged

in Interstate Commerce, are the Mississippi case of Chassaniol v. City of Greenwood, 166 Miss. 848, which was affirmed by the Supreme Court of the United States in 280 U. S., page 390; Jersey Central Power & Light Company v. Federal Power Commission, 319 U. S., 61; New York Ex Rel Pennsylvania Railroad Company v. Knight, 192 U. S. 21, 48 L. Ed. 325, 24 S. Ct. Reporter 202; and United States of America v. Yellow Cab Company, Et Al, 332 U. S. 218-234, 91 L. Ed. 2010.

By Section 2(d) of Chapter 119, Laws of 1934, as amended, the same being Section 10109 of the Code of 1942, it is provided:

> "Upon every person engaging or continuing within this state in the business of operating a pipe line for transporting from one point to another in this state oil or natural gas or artificial gas through pipes or conduits in this State, there is likewise hereby levied and shall be collected a tax, on account of the business engaged in, equal to two per cent of the gross income of the business."

Said section of the law contains six other paragraphs, by the provisions of which the tax is imposed on persons engaging in the business of operating water or public sewerage systems, street railways for the transportation of freight or passengers for hire; upon persons supplying electricity, electric lights, current, power or gas, natural or artificial; and upon persons engaged in the business of operating telegraph lines or telephone lines for transmission of messages between points within the state; and upon persons operating railroads for the transportation of freight or passengers for hire between points within the state; and upon persons engaging in the business of operating an express business, transport-

ing freight or passengers from one point to another within the state. The concluding paragraph in said section providing:

> "There shall be excepted from the gross income used in determining the measure of the tax imposed in this section so much thereof as is derived from business conducted in commerce between this State and other States of the United States, or between this State and foreign countries which the State of Mississippi is prohibited from taxing under the Constitution of the United States of America."

From the Agreed Statement of Facts submitted, paragraph XI, page 34 of the record, and the allegations of the declaration itself, it will be noted that the appellant was required to pay the tax because of the admitted activity on its part of transmitting oil in its pipe line for hire between the point of production in the state and other points within the state, and that its sole activity in connection with the transportation of the oil was wholly intrastate and none of the tax demanded or paid was received from any activity upon its part in transporting oil beyond the boundaries of the state.

The Sales Tax demanded and paid, and which it is sought to recover by this suit, was computed solely on the compensation received by the appellant for transporting oil for hire in its pipe line which did not extend beyond the boundaries of the state.

According to the contention of the Commissioner, charged with the duty of administering the laws involved, there is no other consideration except the admitted activity of the appellant, and the application of the laws involved to such activity. But notwithstanding the fact that the appellant's activities are confined exclusively

within the state, and the compensation received covered no other activity than that wholly within the state, the appellant is claiming immunity from the tax by reason of certain provisions of the law under which the taxes were demanded and paid, which according to the construction uniformly placed by the Commission on said law over a long period of time, had no application whatsoever to the activities of the appellant.

It will be noted that the law in question deals with Excise taxes alone. The Sales Tax being computed on the basis of two per cent of the amount received as compensation for the transportation of oil from one point within the state to another point within the state by pipe line.

When it is realized that Excise tax alone is under consideration, then to my mind, such other taxes as advalorem taxes or the rules governing the taxable property for advalorem purposes are foreign to and have no relation whatsoever to the question before the Court.

Many of the cases cited by the attorneys for the appellant in their brief filed with the Tax Commission, and which the Tax Commission had before it in concluding that the taxes paid were due and many of the cases cited in the brief in this Court have reference to the application only to the situs of property for advalorem taxation purposes. And such authorities were considered by the Commission, as well as this attorney for the appellee, as having no application whatsoever to the question of liability for Excise Taxes, which were based entirely upon the activity of the appellant and the compensation received by it in connection with property belonging to someone else. And that necessarily, since no liability for advalorem taxes existed against the appellant, that decisions with reference to the taxability of property to the

owner thereof for advalorem purposes had no application whatsoever to the question as to liability of the appellant for Excise taxes paid.

In the case of Federal Compress and Warehouse Company v. McLean, Sheriff, reported in 166 Miss., 739, involving the question of liability of the Compress Company for a privilege tax for the privilege of operating a compress, the Compress Company denied liability on the ground that it was a Delaware Corporation operating under the U. S. Warehouse Act, and that the cotton upon which it performed services was in preparation for shipment in interstate commerce. The agreed statement of facts, among other things, was to the effect that the Compress Company was the limited agent of the Railroad Company for the purpose of receiving the cotton from the Railroad Company and delivering the cotton to the Railroad Company, loading and unloading the cotton from and into the cars of the said Railroad; and as principal, to furnish the premises for the use of the Railroad Company as a cotton depot under and subject to all of the terms and conditions and lawfully published tariffs and regulations of the Railroad Company from time to time, with respect to the transportation in the handling of the cotton.

The facts further showed that the rates arranged by the Railroad Company for transporting the cotton that had been shipped to the compress from the interior point on a local bill of lading is the through rate from the point from which it was shipped to the compress company to the point of destination under the new bill of lading which the Railroad issued when the cotton was delivered to it by the compress company. And that the compress company's charges for compressing and handling the

cotton was paid by the Railroad Company, which charges, together with the railroad transportation charges, were approved by the Interstate Commerce Commission.

The court upon this state of facts, and upon the contention of the compress company that the cotton moving through the appellant's warehouse and compress entered into and became a part of Interstate Commerce, held that it became interstate commerce when, *but not until*, it commenced its journey from this state to another state or country; in other words, when the cotton was delivered to the Railroad Company for transportation into another state or country. The Court further held that this did not occur until the cotton was delivered to the Railroad after being handled and compressed for transportation. And that the assembling of the cotton in the warehouse and its compression were only acts preliminary, convenient for, but not absolutely essential, to its transportation to other states or countries.

The Supreme Court of Mississippi having held that the Compress Company was liable for the tax, notwithstanding that its activities were wholly in connection with the handling of cotton which was ultimately shipped beyond the boundaries of the state, the Compress Company appealed the case to the Supreme Court of the United States. And the decision of the United States Supreme Court thereon is to be found in 291 U. S. at page 17. The Supreme Court of the United States affirmed the decision of the lower court and held that the fact that the compress company's contract with the Interstate rail carrier designated the compress company as a carrier's agent, and the compress company's warehouse as a carrier depot, could not alter the legal consequences as to what is actually done with the cotton.

The Court held further that it is not within the power of the parties by descriptive terms of their contract to convert a local business into an interstate commerce business, protected under said commerce clause. And the Court further held that the compress company in the enjoyment of the privilege which it engaged in upon its own behalf, was not subject to government control since it was the conduct of a private business for profit. And the Court further held that the mere extension of control over a business by the national government does not withdraw it from a local tax which presents no obstacle to the execution of the national policy.

The case which more nearly approaches the exact question before the Court, is the decision by the Supreme Court of the United States in the case of the Atlantic Coast Line Railroad Company v. Standard Oil Company, 275 U. S. 257. The language of the Court in its decision, which is directly applicable to the question before the Court in this case is as follows:

> "The question whether commerce is interstate or intrastate must be determined by the essential character of the commerce, and not by the mere billing or terms of contract, although that could be one of a group of circumstances tending to show such character. The re-shipment of an interstate or foreign shipment does not necessarily establish a continued movement or prevent the shipment to a point within the same state from being an independent or intrastate character even though it is in the same car."

On the question of whether or not the imposition of the tax upon the local activity of the plaintiff would do violence to the right of the federal authorities or the Interstate Commerce Commission to regulate the rates to

be charged for services which might be proper in view of the nature of the service rendered by the plaintiff as a common carrier, the following language of the Supreme Court of the United States is applicable as contained in the case of Parker vs. Brown in 317 U. S., 341, the language of the Court being as follows:

> "State regulations affecting interstate commerce are to be sustained, not because they are 'indirect', rather than 'direct', not because they affect rather than command operations of interstate commerce, but because upon a consideration of all relevant facts and circumstances, the matter appears an appropriate one for local regulations, for which there may be wide scope without materially obstructing the free flow of commerce."

In the case of Chassaniol v. City of Greenwood, reported in 166 Miss., at page 848, the Court had before it the question of whether or not the imposition of the privilege tax upon each cotton broker who buys and sells cotton was improper because the activity of the buyer upon which the privilege tax was imposed was the purchase of the cotton to be shipped in interstate commerce.

The Court in the consideration of this question used the following pertinent language which is applicable to the case before this Court:

> "The essential character of commerce upon the accident of through bills of lading is its continuity of movement in foreign commerce, and that determines federal or state control over it and it takes character as interstate or foreign commerce *when it is actually started in the course of transportation to another state or to a foreign country.*" (Emphasis supplied).

The Court in its opinion referred to the case of Superior Oil Company v. Mississippi, in which our Supreme Court held that the Excise Tax imposed upon the sale of gasoline was due, even though it left the storage tanks of the oil company in drums, labeled and consigned to points beyond the state. The Court holding that the pertinent facts controlling the transaction were that the gasoline was actually bought and paid for by a purchaser residing within the state, and that the billing of same to a point beyond the state was a mere subterfuge and could not defeat actual facts with reference to the transaction being strictly local and subject to state control. The decision of the Supreme Court of Mississippi was affirmed by the Supreme Court of the United States in 280 U. S. 390. Our Supreme Court, in said opinion used the following language:

> "The transaction is to be determined by its facts and not by a fantastic, farfetched consideration."

The Court used the following language, which is directly applicable to this case and answers the contentions made by the appellant in the cases cited to this Court, most of same being mentioned and discussed in the opinion of our Court. The language referred to being as follows:

> "The cases relied upon by the appellant can all be differentiated from the case before us. It does not matter whether the intrastate business done was merely equal to the interstate business, the state's control over the intrastate business is full and complete, subject only to the provisions of the Federal Constitution. The powers of the state, not given to the United States government by the Federal Constitution, are reserved to the state or the people.

The state constitutes an essential unit in the federal scheme, and the state should not be embarrassed in the operation of its functions within its sphere, but should be left to discharge those functions according to its own conception thereof."

This case was likewise appealed to the Supreme Court of the United States and there affirmed. And the following language of the Supreme Court of the United States is peculiarly applicable to the question before this Court, said language being as follows:

"Chassaniol contends that all the cotton is in interstate or foreign commerce from the moment it leaves the gin for Greenwood, or at least from the moment it is purchased at Greenwood by the buyer. The argument is that already at that time the cotton is destined for ultimate shipment to some other state or country; and that to tax the occupation of the cotton buyer burdens interstate commerce, since the buyer at Greenwood is the instrumentality by which the interstate transaction is initiated. The business involved is substantially like that described in Federal Compress Co. v. McLean; and the rule there declared must govern here. Ginning cotton, transporting it to Greenwood, and warehousing, buying and compressing it there, are each, like the growing of it, steps in preparation for the sale and shipment in interstate commerce. But each step prior to the sale and shipment is a transaction local to Mississippi, a transaction in intrastate commerce. Hence those engaged in performing any such local function may be subjected to an occupation tax, just as the property used, or processed by them may be subject to a property tax."

The attorneys for the appellant make frequent reference to the case of Freeman v. Hewitt, reported in 329 U. S. at page 249. But I fail to see the application of the question decided in that case to the question before the Court at bar. The Court had before it in said case only the question of authority of Indiana to tax a sale, which was admittedly an "interstate sale". Whereas, the case at bar does not involve a sale, but involves only a tax imposed upon a strictly local activity, that has no interstate aspects. The case only emphasizes the old established rule that a State may not tax or place any burden upon interstate commerce, and the only basis for the contention made on behalf of the appellant in this case is that at the time that the oil was delivered to the appellant for transportation from one point to another in the State, it was known that the oil would ultimately be moved out of the State by an interstate carrier. And some of the cases cited by the Court in said opinion hold that the mere fact that goods are manufactured within a State, or handled in any other way locally, are not regarded as in interstate commerce, even though such goods are manufactured for the purpose of shipment outside of the State.

This thought is emphasized by the following language used by the Court in said opinion:

> "As a practical matter, it can make such commerce pay its way, as the phrase runs, apart from taxing the very sale. Thus, it can tax local manufacture even if the products are destined for other States. For some purposes, manufacture and the shipment of its products beyond a State may be looked upon as an integral transaction. But when accommodation must be made between state and national interests, manufacture within a State, though destined for

shipment outside, is not a seamless web so as to prevent a State from giving the manufacturing part detached relevance for purposes of local taxation. American Mfg. Co. v. St. Louis, 250 U. S. 459; Utah Power & L. Co. v. Pfost, 286 U. S. 165."

With further reference to the proper rule as applied to the taxability of local activities of the appellant, without reference to the ultimate destination of the commodity handled by it, I call the Court's attention to the case of Department of Treasury of Indiana v. Ingram-Richardson Manufacturing Company of Indiana, reported in 313 U. S. at page 352.

In this case a plant which had a patent upon an exclusive enameling process sent its representatives into adjoining states soliciting business of manufacturers of bath room fixtures, stoves, and other equipment that required enameling in its finished state. When the business was procured, the representatives of the company transported the material to be treated from without the state into the state of Indiana. And after the service was rendered in the enameling of the equipment, and preparing it for ultimate sale, it was then transported out of Indiana into adjoining states, and a charge made for the entire service rendered.

The manufacturing Company claimed that the whole transaction constituted interstate commerce, since the material treated was brought from without the state and when treated, was again transported out of the state in interstate commerce for sale in other states. But the Court held that the tax was based upon the value of the service rendered, which consisted chiefly of activities within the State of Indiana, and was therefore taxable

under the gross income tax law of Indiana, which is similar in all respects to our so-called Sales Tax Law.

The Court, in holding that the company performing the service was taxable upon the entire income, regardless of the fact that activity within the state was only part of the service rendered, and the transportation across the state lines was also involved, and the material treated was immediately delivered by the company to customers in other states, using the following significant language:

> "The enameling process was an activity performed at respondent's plant in Indiana and the gross receipts therefrom were taxable by Indiana under its Gross Income Tax Law."

Cited in support of said conclusion was a case of Department of Treasury of Indiana v. Wood Preserving Corporation, reported in 313 U. S. at page 62.

In said case the facts were that the company purchased cross ties from the local producers in Indiana and sold and delivered these ties to the Railroad Company in Ohio. The ties were inspected by a representative of the Railroad Company at the place of production and were accepted before being loaded on freight cars to be transported into Ohio.

The contention was made that because the cross ties were transported into Ohio from the place of purchase and delivered to the Railroad Company in Ohio after being treated with creosote, that so far as the sale and transportation were concerned, were in interstate commerce, but the Court held in answer to this contention that:

"These were local transactions, sales and deliveries of particular ties by the respondent to the Railroad Company in Indiana.

"The transactions were none the less intrastate activities because the ties thus sold and delivered were forthwith loaded on the railroad cars to go to Ohio for treatment. The contract providing for that treatment called for the treatment of ties to be delivered by the Railroad Company at the Ohio plant, and the ties bought by the Railroad in Indiana, as above stated, were transported and delivered by the Railroad Company to that treatment plant. Respondent did not pay the freight for that transportation and the circumstance that the billing was in its name as consignor is not of consequence in the light of the facts showing the completed delivery to the Railroad Company in Indiana."

The Court cited in support of its last conclusions the case of Superior Oil Company v. Mississippi, 280 U. S. 390, which has been heretofore discussed in support of the contention that the sale of gasoline was held by our Court and affirmed by the Supreme Court, holding that the transaction was none the less a local activity even though the gasoline was purchased for and consigned to persons situated outside the State of Mississippi.

Another comparatively recent decision by the Supreme Court of the United States is applicable in principle, to the question before this Court. I refer to the case of Jersey Central Power & Light Company v. Federal Power Commission, reported in 319 U. S. at page 61.

Under the Federal Power Act of Congress of 1935, the Federal Power Commission was given authority to regu-

late the rates and charges of power companies transmitting power in interstate commerce.

Section 201 (a) of the Act provided that since the business of transmitting electric energy for ultimate distribution to the public affected the public interest, that the Federal Power Commission had the authority to regulate such matters where the transmission of electricity was in interstate commerce.

The Jersey Central Power & Light Company maintained a plant wholly within the state of New Jersey, but transmitted its power to a connecting line in New York. And it was contended by the Federal Power Commission that because the power was delivered to a connecting line and thence transmitted beyond the borders of the state of New Jersey, that the Power Commission had jurisdiction to fix the rates and charges.

The language of the Court applicable to the question before this Court, in distinguishing a strictly intrastate activity, from an interstate activity is covered by the following language of the Court:

> "Sub-section (c) defines the electric energy in commerce as that 'transmitted from a State and consumed at any point outside thereof.' There was no change in this definition in the various drafts of the bill. The definition was used to 'lend precision to the scope of the bill.' It is impossible for us to conclude that this definition means less than it says and *applies only to the energy at the instant it crosses the state line and so only to the facilities which cross the line and only to the company which owns the facilities which cross the line.*" (Emphasis Supplied).

The appellant filed as an exhibit to its declaration a copy of its tariff, which is typical of similar tariffs is-

sued in connection with its activities at various places within the state where it operated its gathering lines from the field of production to the place on some railroad within the state where the oil was delivered to a common carrier for transportation without the state.

Typical of the general provision is the tariff setting out the rate for gathering and transporting crude petroleum by pipe lines from the lease tankage within the territory of the Interstate Oil Pipe Line system in Eucatta Field, Wayne County, Mississippi, to the point of the Interstate Oil Pipe Line Company on the Gulf, Mobile & Ohio Railroad at Hiwannee, Wayne County, Mississippi. It will be noted that the rate in cents per barrel of forty-two gallons is Eight Cents. And this charge is no doubt the total charge for the transmission of the oil between said two points in Mississippi. But in addition to said rate, there is an additional provision titled "Loading Charge," which provides that

> "All crude petroleum required to be loaded into railroad tank cars or tank trucks at above destination will be subject to an additional charge of Two Cents per barrel."

The next tariff in the order of arrangements shows that the charge for transporting crude oil from the same place to the same destination in the state, which tariff was issued March 14, 1946, and succeeded tariff formerly referred to which was issued January 2, 1945, the charge of transportation on each barrel of oil over said distance was raised to Nine Cents. But the charge for loading the oil into tank cars or truck tanks after it reached its destination remained at Two Cents per barrel.

It will be noted that not only has the service rendered been separated into separate and distinct acts and the

charges were made for transportation of oil from oil field to the loading ramp varied according to the distance, but that in each instance where the oil was further handled by the company by loading same into tank cars or tank trucks, there was an additional charge of Two Cents per barrel for loading remained the same notwithstanding the fact that the charge for transporting the oil from the oil field where produced to the place in the state where same was to be delivered to the common carrier, varied from time to time.

For the purpose of demonstrating to the Court that the appellant not only regarded its several activities separately and made the charge accordingly for separate acts performed in connection with the oil transported within the state, charging one price for some transmissions from point to point within the state, and an additional charge for handling the oil whether by loading same after it had reached its destination within the state, but by a tariff published after it had established its trunk line, and which activity was continuous from the point of gathering through its own pipe line continuous without the state, even then the transportation charge was separate, so as to show separately and distinctly the value of the service rendered within the state and the service rendered after the state line was reached.

For instance, the tariff referred to shows that oil transported from Cranfield in Adams County to the point where same entered its trunk pipe line, the charge for gathering and transporting it to the two points within the state remained Four Cents per barrel, but the transportation rate after it reached the state line to its ultimate destination in East Baton Rouge Parish was charged separately as Seven Cents per barrel, making

the total transportation charge from the field in Mississippi where gathered to its ultimate destination without the state, Eleven Cents per barrel. But even then, the appellant regarded the transportation from the field to the point where it entered its own trunk line as a separate and distinct activity, the compensation for which was paid separately.

The Court will bear in mind that the department has been very liberal in its construction of the law, and has refrained from making any demand for any taxes upon the amount received by the appellant for any service rendered within the state, when appellant actually transported the oil beyond the limits of the state with its own facilities. This was the rule of the department even though the appellant itself regarded the gathering and transporting of the oil to a common carrier in the state as a separate activity and made a separate charge therefor.

I therefore feel justified in saying that in the construction of the exemption feature of the two laws relied upon by the appellant in claiming non-liability, have been very liberally construed in favor of the appellant, although it is the uniform rule laid down by all the Courts that exemption statutes should be strictly construed and that when any doubt arises as to whether or not an exemption is granted by any statute, the doubt must be resolved against the exemption.

For the purpose of making a simple, practical demonstration of the result of adopting the construction of the attorneys for the appellant, that the mere fact that before the oil is moved from the place of production, the appellant is notified as to the amount of oil to be moved, the consignee to which the oil is to be shipped, and the ulti-

mate destination of the oil, would make the activity of the plaintiff in transporting the oil from the place of production to the place within the state where the actual interstate movement begins, interstate commerce, I suggest that if this rule is correct, then, if I employ the services of a taxicab or other local conveyance, with instructions to go to my home and transport a member of my family and their baggage to a railroad station within the state, informing the driver of said taxicab that the person and baggage transported to the depot is for the purpose of making an interstate journey; and if I should also request the taxi driver to procure a reservation for the person to be transported on a train or pullman, then the service of the taxicab wholly within the confines of the state or city would be interstate transportation.

In the annotation to a case reported in 27 ALR, which annotation begins on page 1139 of said volume, the following language appears, which to my mind, fully demonstrates the incorrectness of the position taken by the appellant, using the identical illustration for the purpose of such demonstration. The language referred to is as follows:

> "In New York ex rel. Pennsylvania R. Co. v. Knight (1904) 192 U. S. 21, 48 L. ed. 325, 24 Sup. Ct. Rep. 202, affirming (1902) 171 N. Y. 354, 98 Am. St. Rep. 610, 62 N. E. 152, it was held that a franchise tax imposed under New York statutes upon the Pennsylvania Railroad Company for carrying on a cab service wholly within the state, for the purpose of conveying its passengers to and from its ferry landing in New York City, the charges for which were entirely separate from those for other transportation, was not an unconstitutional burden on interstate

commerce, but a tax upon an independent local service, preliminary or subsequent to any interstate transportation. The Court said that it was true that a passenger over the railroad to New York City did not, in one sense, fully complete his journey when he reached the ferry landing on the New York side, but only when he was delivered at his temporary or permanent stopping place in the city; and that, looking at the matter from this standpoint, the cab service was simply one element in continuous interstate transportation, and as such would be excluded from state control; but that, *on the other hand, the cab service was exclusively rendered within the limits of the city, and was contracted and paid for independently of any contract or payment for strictly interstate transportation;* and that when service is wholly within a state it is presumably subject to state control, and that the burden is on one who asserts that though actually within, it is legally outside, the state; so that unless the interstate character was established, locality determined the question of jurisdiction. The Court further stated: 'Many things have more or less close relation to interstate commerce which are not properly to be regarded as a part of it. If the cab which carries the passengers from the hotel to the ferry landing is engaged in interstate transportation, why is not the porter who carries the traveler's trunk from his room to the carriage also so engaged? If the cab service is interstate transportation, are the drivers of the cabs and the dealers who supply hay and grain for the horses also engaged in interstate commerce? And where will the limit be placed? *We are of the opinion that the cab service is an independent local service, prelim-*

inary or subsequent to any interstate transportation'." (Emphasis supplied).

There are many other cases in the books using the identical or similar illustrations of the correct construction and differentiation between interstate and intrastate commerce. I find a case decided by the Supreme Court of the United States on June 23, 1947, and reported in Advance Sheet Number 16 of Volume 67 Sup. Ct. reported at page 1560, where the said court drew the same distinction, and used the same illustration which I have used in distinguishing between interstate and intrastate commerce, and where such interstate transportation actually begins.

The case referred to is that of the United States of America vs. Yellow Cab Company et al. The question before the Court was whether or not certain cab companies were violating the anti-trust laws by the contracts entered into with certain railroad companies by which they monopolized transportation of passengers to and from connecting railroads, or from their places of residence to railroad stations where they would embark on interstate journeys. The language of the court referred to, and which I deem to be applicable to the question before the court is as follows:

"The interstate commerce toward which this aspect of the conspiracy is directed is claimed to arise out of the following facts. Many persons are said to embark upon interstate journeys from their homes, offices, and hotels in Chicago by using taxicabs to transport themselves and their luggage to railroad stations in Chicago. Conversely, in making journeys from other states to home offices and hotels in Chicago, many persons are said to complete such trips

by using taxicabs to transport themselves and their luggage from railroad stations in Chicago to said homes, offices and hotels. Such transportation of persons and their luggage is intermingled with the admittedly local operations of Chicago taxicabs. But it is that allegedly interstate part of the business upon which rests the validity of the complaint in this particular.

"We hold, however, that such transportation is too unrelated to interstate commerce to constitute a part thereof within the meaning of the Sherman Act. These taxicabs, in transporting passengers and their luggage to and from Chicago railroad stations, *admittedly cross no state lines;* by ordinance, their service is confined to transportation 'between any two points within the corporate limits of the City.' None of them serves only railroad passengers, all of them being required to serve 'every person' within the limits of Chicago. *They have no contractual or other arrangement with the interstate railroads. Nor are their fares paid or collected as part of the railroad fares.* In short, their relationship to interstate transit is only casual and incidental.

"In a sense, of course, a traveler starts an interstate journey when he boards a conveyance near his home, office or hotel to travel to the railroad station, from which the journey is continued by train; and such journey ends when he alights from a conveyance near the home, office or hotel which constitutes his ultimate destination. Indeed, the terminal points of an interstate journey may be traced even further to the moment when the traveler leaves or enters his room or office and descends or ascends the building by elevator.

"But interstate commerce is an intensely practical concept drawn from the normal and accepted course of business. Swift & Co. v. United States, 196 U. S. 375; 398; North American Co. v. S. E. C., 327 U. S. 686, 705. And interstate journeys are to be measured by 'the commonly accepted sense of the transportation concept.' United States v. Capital Transit Co., 325, U. S. 357, 363. Moreover, what may fairly be said to be the limits of an interstate shipment of goods and chattels may not necessarily be the commonly accepted limits of an individual's interstate journey. We must accordingly mark the beginning and end of a particular kind of interstate commerce by its own practical considerations.

"Here we believe that the common understanding is that a traveler intending to make an interstate rail journey begins his interstate movement when he boards the train at the station and that his journey ends when he disembarks at the station in the city of destination. What happens prior or subsequent to that rail journey, at least in the absence of some special arrangement, is not a constituent part of the interstate movement." (Emphasis supplied).

As authority for the contention of the Commissioner that the preliminary movement of the oil from the place of production to another place within the state, where it is to be delivered to the carrier with facilities for transporting beyond the state, is not only an intrastate movement, but such movement as contemplated by the statute under consideration, I refer the Court to the case of Pennsylvania Railroad Co. v. Knight, decided by the Supreme Court of the United States on January 4, 1904, reported in 192 U. S. at page 21. This is a comprehensible rule directly applicable to the facts in this case, and has

never been overruled. The language of said decision directly applicable to this case being as follows:

"To hold the even balance between the Nation and the State in the exercise of their respective powers and rights, always difficult, is becoming more so through the growing complexity of social life, and business conditions. Into many relations and transactions there enter elements of a national as well as those of a state character, and to determine in a given case which elements dominate and assign the relation or transaction to the control of the Nation or of the State, is often most perplexing. And this case fully illustrates the perplexities.

"It is true that a passenger over the Pennsylvania Railroad to the City of New York does not in one sense fully complete his journey when he reaches the ferry landing on the New York side, but only when he is delivered at his temporary or permanent stopping place in the city. Looking at it from this standpoint, the company's cab service is simply one element in a continuous interstate transportation, and as such would be excluded from state and be subject to national control. The State may not tax for the privilege of doing an interstate commerce business. (Atlantic & Pacific Telegraph Company v. Philadelphia, 190 U. S. 160). *On the other hand the cab service is exclusively rendered within the limits of the city. It is contracted and paid for independently of any contract or payment for strictly interstate transportation. The party receiving it owes no legal duty of crossing the state line.*"

"Goods shipped from Albany to Philadelphia may be carried by the New York Central Railroad only

within the limits of New York, and yet that service is an interstate carriage. By reason thereof, the Nation regulates that carriage, including the part performed by the New York Company. *But it does not follow therefrom that the New York Company is wholly relieved from state regulation and state taxation,* for a part of its work is carriage and transportation begun and ended within the State. So the Pennsylvania Company, which is engaged largely in interstate transportation, is amenable to state regulation and state taxation as to any of its service, which is wholly performed within the State and not as a part of interstate transportation." (Emphasis supplied).

"It is true, it was said in the case of Daniel Ball, 10 Wall. 557, 565, 'whenever a commodity has begun to move as an article of trade from one State to another, commerce in that commodity between the State has commenced.' But this movement does not begin until the articles have been shipped or started for transportation from the one State to the other. *The carrying of them in carts or other vehicles, or even floating them, to the depot where the journey is to commence is no part of that journey.* This is all preliminary work, performed for the purpose of putting the property in a state of preservation and readiness for transportation. Until actually launched on its way to another State, or committed to a common carrier for transportation to such state, its destination is not fixed and certain. It may be sold or otherwise disposed of within the State, and never put in course of transportation out of the State. Carrying it from the farm, or the forest, to the depot, is only an interior movement of the property, entirely with-

in the state, for the purpose, it is true, but only for the purpose, of putting it into a course of exportation; it is no part of the exportation itself. Until shipped or started on its final journey out of the State, its exportation is a matter altogether in fieri, and not at all a fixed and certain thing' (Diamond Match Company v. Ontonagon, 188 U. S. 82; Detroit &c. Railway Company v. Interstate Commerce Commission, 21 C. C. A. 103; 43 U. S. App. 308; Interstate Commerce Commission v. Detroit &c. Railway Company, 167 U. S. 633.)" (Emphasis supplied).

Merely to illustrate to this Court that the rule announced in the case just quoted from has never been overruled or modified, I call the Court's attention to the fact that in a recent case, United States v. Yellow Cab Company, heretofore cited, which was decided on June 23, 1947, cited the foregoing case with approval in the following words:

"Pennsylvania R. Co. v. Knight, 192 U. S. 21, 24 S. Ct. 202, 48 L. Ed. 325, demonstrates this common understanding. The Court there held that the Pennsylvania Railroad Company was subject to a state franchise tax by reason of the fact that it maintained a cab service within the boundaries of New York City for the sole benefit of its rail passengers. Its cabs transported the passengers between its ferry station and their residences and hotels. The Court stated that this cab service was an independent local service, preliminary or subsequent to any interstate transportation and not included in the contract of railroad carriage. Hence it was subject to state taxation."

All of the foregoing was before the lower court in the form of a brief which was considered by the lower court

along with the authorities cited by the attorneys for the appellant. And although the attorneys had the benefit of the argument hereinbefore contained in the preparation of their principal brief in this case, I assert, with confidence, that they cited no cases in their brief which hold contrary to the authorities hereinbefore discussed in any case with similar facts. And I shall therefore make reply only to such cases as are cited by the attorneys for the appellant in their brief which I deem to have any bearing on the question before this Court.

Since Point B in the brief of the attorneys for the appellant deals only with the question of the right of the state to tax interstate commerce, I do not deem it necessary to dwell at length on this point in the brief of the attorneys for the appellant. And there is no effort on the part o fthe appellee to contend that any tax is imposed by the laws under consideration, if the appellant was actually engaged in interstate commerce as contemplated by said statute.

I shall therefore address the balance of this brief only to a discussion of the contention of the attorneys for the appellant, and make reference only to the cases which they cite in support of their contention that the activities of the appellant within the State of Mississippi which were the basis of the demand for the taxes paid, and sought to be recovered by this suit, in point A of this brief.

This Court will bear in mind that this appellant during the period in which activities were engaged in in the State of Mississippi on account of which the taxes in question were demanded and paid, consisted wholly of transportation of oil by pipe line from a point in the state to another point in the state, which is a description of

the business taxe by the Tax Statute under consideration. It will also be borne in mind by the Court that the appellant had no facilities for, did not in any sense transport any oil across the state line; and received no compensation other than that paid for the actual number of miles which oil was transported from the place of production in this state to its ultimate destination in this state so far as the activity of the appellant was concerned, and it admittedly had no contract to transport oil beyond the boundary of the state, had no facilities for transporting the oil outside of the state, and received no compensation except that measured by the price per barrel which it charged according to the number of miles within the state which the oil was transported.

I therefore respectfully submit that under these admitted facts the question before this Court is reduced to its simplest form, that is, as to whether or not the appellant engaged in such activity within the state as it was sought to tax by the statute of Mississippi imposing the tax collected. And all efforts on the part of the attorneys for the appellant to convert such limited activity within the state into an integral part of interstate commerce over which the state would have no control, in my judgment, have utterly failed.

One of the earliest cases cited by the attorneys for the appellant refers to the case of Daniel Ball, 10 Wall. 557. And by reference to said case it will be noted that the Court said:

> "Whenever a commodity had begun to move as an article of trade from one state to another, commerce on that commodity between the states had commenced, *but this movement does not begin until the articles have been shipped or started for transporta-*

tion from the one state to the other." (Emphasis supplied).

And it will be further noted in the same opinion that the carrying of said articles to the place where the journey out of the state begins is no part of the interstate movement.

Another case cited by the attorneys for the appellant is West Virginia Pipe Line Co. v. State, 120 Southeastern 759. This case was cited only for the purpose of establishing the rule that transportation of oil by pipe line is commerce, about which there is no disagreement.

Other cases cited by the counsel for the appellant are the cases of Federal Compress and Warehouse Co. v. E. R. McLean, Sheriff, 291 U. S. 17, and Chassaniol v. City of Greenwood, 291 U. S. 584, both being the Mississippi cases heretofore discussed at length in this brief, and I shall therefore not dwell upon said cases.

While the attorneys for the appellant in their printed brief show in the index under the head "Table of Cases," eighty-eight cases, a review of all of said cases will show that they fall into three separate and distinct classes. And without burdening the Court by attempting a detailed analysis of each case, I can assure the Court that many of them deal only with the right of the state to tax interstate commerce, which question is not in dispute, and many of the cases deal only with the question of the status of property for advalorem purposes at certain stages of a movement which is ultimately to be interstate. And the cases in the last class, I confidently assert have no bearing on the liability of the appellant for an excise tax which is applied to the activity of the appellant within the state in the manner of handling property, whereas

the advalorem cases are decided on an entirely different basis and under different principles of law.

Many of the cases listed in the index of the printed brief for the appellant, while not discussed in detail, will be found to deal with many subjects, including the regulation of Interstate Commerce by states, which has no bearing on the question before the Court, and some of the cases deal with other subjects not pertinent to the issue presented to the Court in this case. And while I have scanned through the entire list of cases shown in the index, and have determined the class in which each case falls, I shall not consume the time of the Court in discussing the cases cited and not discussed in the brief of the appellant.

The case of the Railroad Commission v. Worthington, 225 US, 101 deals only with the right of the State to fix rates covering the within state movement of commodities actually in continuous movement in interstate commerce.

The case of Southern Pacific Terminal Company v. Interstate Commerce Commission, 219 US, 498 only holds that when goods are actually started in the coure of interstate transportation to another state, they are regarded as in interstate commerce.

The next case in order, Texas and New Orleans Railroad Co. v. Sabine Tram Company, 227 US, 111 merely holds that the question of the right to fix rates depends on whether or not the shipment has actually begun movement for export in determining what authority may fix the rate.

I shall not burden the Court by taking up each separate case in detail where same were not commented upon by the attorneys for the appellant, but I merely mention

these cases from time to time as indicative of the fact that many cases are cited which have no bearing upon the exact question before the Court. As for instance, the case of Eureka Pipe Line Company v. Hallanan, 257 US, 265 dealt only with the question with reference to the tax measured by the quantities produced where interstate and intrastate movements were commingled in movement out of the state, and the case of Hughes Brothers Timber Company v. Minnesota, 272 US, 469 deals only with the question of whether or not logs which have started in interstate movement are subject to advalorem taxes.

The next case cited by the attorneys for the appellant is the case of Richfield Oil Corporation v. State Board of Equalization, said citation being to 163 Pac. (2d), page 3, but this same case was appealed to the Supreme Court of the United States and is reported in 91st Law Ed., page 123. And I therefore suggest to the Court that the following language taken from the opinion of the Supreme Court of the United States plainly distinguishes this case from the case at bar.

The Court will bear in mind that the question under consideration by the Court is whether or not the tax imposed upon the sale of the commodity, under the California Sales Tax Law and the question was raised as to whether or not the imposition of the tax would be in violation of the constitutional inhibition against states imposing tax on imports or exports:

> "When taxed it was not held with the intent or for the purpose of exportation, but with the intent and for the purpose of sale there, in New Orleans. A duty on exports must either be a duty levied on goods as a condition, or by reason of their exportation, or,

at least, a direct tax or duty on goods which are intended for exportation. Whether the last would be a duty on exports, it is not necessary to determine. But certainly, where a general tax is laid on all property alike, it cannot be construed as a duty on exports when falling upon goods not then intended for exportation, though they should happen to be exported afterwards."

The language just quoted shows that said case had no application to the case before this Court because the tax in question was not imposed on the owner of the oil, nor does it have any application to the amount of oil sold nor the ultimate destination of the oil in question, the sole imposition being for a purely local activity of the appellant herein which was engaged solely in transportation of commodities for hire between the two points within the state.

The quotation from the opinion in the brief for the appellant plainly show that even in this case that in order to come within the prohibition of the imposition of the tax, the common carrier to whom the commodity is first delivered must be one "whose sole purpose is to transport goods to an out of state destination." The other language quoted in the brief of the appellant "The beginning of the transit which constitutes interstate commerce is the point of time when an article is *started on its ultimate passage.*"

Another recent case cited by the attorneys for the appellant is the case of Interstate Natural Gas Company, Inc. v. Federal Power Commission, 91 L Ed. page 1555. Said case likewise dealing only with the right of the Federal Power Commission to regulate the rate to be charged for gas admittedly sold in interstate commerce, and the

following language from the opinion of the Court served to definitely distinguish the question decided in that case from the question presented to the Court in this case, where only the activity of the appellant consisted of transporting the oil between points within this state for the purpose of making delivery to an interstate carrier who alone contracted to move the oil from this state to another state:

> "Clearly, among the powers thus reserved to the States is the power to regulate the physical production and gathering of natural gas in the interests of conservation or of any other consideration of legitimate local concern. It was the intention of Congress to give the States full freedom in these matters. Thus, where sales, though technically consummated in interstate commerce, are made during the course of production and gathering and are so closely connected with the local incidents of that process as to render rate regulation by the Federal Power Commission inconsistent or a substantial interference with the exercise by the State of its regulatory functions, the jurisdiction of the Federal Power Commission does not attach."

The attorneys for the appellant next invoked certain decisions of the Supreme Court of the United States in what is known as the Stevedoring cases. And I respectfully submit that said cases have no application whatsoever to the question presented in the case before the Court for the reason that the stevedoring cases have to do with maritime shipping, which has been distinguished by the Courts due to the peculiar nature of such shipping, and the necessity for loading ships by experts for the protection not only of the cargoes, but the ships themselves.

It seems that from the early days, commerce carried on by shipping on navigable waters was held to be under the exclusive jurisdiction of the Maritime Department, and that Congress had put a different construction on the rules with reference to commerce, and that maritime service was subject to different construction for the reasons set out in the various cases.

One of the early cases in which this rule was first announced was that of Atlantic Transport Company vs. Imbrovek, reported in 234 U. S. at page 52.

This case involved a suit by a person injured in the loading of a ship. And the question presented to the Court was whether or not the same rule of liability would apply to injuries received in this class of work, and what court would have jurisdiction to hear the matter. In the decision of this question the Court used the following language:

> "The libelant was injured on a ship lying in navigable waters, and while he was engaged in the performance of a maritime service. We entertain no doubt that the service in loading and stowing a ship's cargo is of this character. Upon its proper performance depend in large measure the safe carrying of the cargo and the safety of the ship itself; and it is a service absolutely necessary to enable the ship to discharge its maritime duty. Formerly, the work was done by the ship's crew; but, owing to the exigencies of increasing commerce and the demand for rapidity and special skill, it has become a specialized service devolving upon a class 'as clearly identified with maritime affairs as the mariners'."
>
> "If more is required than the locality of the wrong in order to give the court jurisdiction, the relation

of the wrong to maritime service, to navigation and to commerce on navigable waters, was quite sufficient. Even with respect to contracts where subject matter is the exclusive test, it has been said that the true criterion is "whether it was a maritime contract, having reference to maritime service or maritime transactions'."

The next case in order which bears on this same question is that of International Stevedoring Company vs. Haverty, reported in 272 U. S. at Page 50.

In this case the action was brought in a state court, seeking a common law remedy for personal injuries sustained by the plaintiff on a vessel at dock in the harbor at Seattle, Washington. The plaintiff was a longshoreman engaged in storing freight in the hold of a vessel and claimed that through the negligence of the hatchtender that the freight was lowered into the hold and injured the plaintiff badly.

The plaintiff argued that the case was governed by the Admiralty law; and that the Admiralty law had taken up the common law doctrine as to fellow servants. The Court in passing on this question used the following language:

"It is true that for most purposes, as the word is commonly used, stevedores are not 'seamen.' But words are flexible. The work upon which the plaintiff was engaged was a maritime service formerly rendered by the ship's crew. Atlantic Transport Co. v. Imbrovek, 234 U. S. 52, 62. We cannot believe that Congress willingly would have allowed the protection to men engaged upon the same maritime duties to vary with the accident of their being employed by a stevedore rather than by the ship. The policy of

> the statute is directed to the safety of the men and to treating compensation for injuries to them as properly part of the cost of the business. If they should be protected in the one case they should be in the other. In view of the broad field in which Congress has disapproved and changed the rule introduced into the common law within less than a century, we are of the opinion that a wider scope should be given to the words of the act, and that in this statute 'seamen' is to be taken to include stevedores employed in the maritime work on navigable waters as the plaintiff was, whatever it might mean in laws of a different kind."

These cases were cited and discussed in the leading case, to-wit: Puget Sound Stevedoring Company vs. State Tax Commission, reported in 302 U. S. at page 90. And the Puget Sound case is the one relied upon by the Court in its decision in the case of Joseph vs. Carter and Weeks Stevedore Company, cited by the attorneys for the plaintiff in this case. And while the case involved the right of the State of Washington to impose the tax on the business of engaging in any business activities within the state, the question was raised, and decided by the Court that since the business of stevedoring, for the reasons hereinbefore set out, constituted a part of interstate commerce, then the Court held that the tax was not applicable to said business, and the following language of the Court in said case explains the basis of said holding and the reasons therefor, as heretofore indicated by the cases quoted from. The language of the court and explanation of its holding being as follows:

> "Transportation of a cargo by water is impossible or futile unless the thing to be transported is put aboard the ship and taken off at a destination. A

stevedore who in person or by servants does work so indispensable is as much an agency of commerce as ship-owner or master. 'Formerly the work was done by the ship's crew; but owing to the exigencies of increasing commerce and the demand for rapidity and special skill, it has become a specialized service devolving upon a class as clearly identified with maritime affairs as are the mariners.' Atlantic Transport Co. v. Imbrovek, 234 U. S. 52, 62. No one would deny that the crew would be engaged in interstate or foreign commerce if busied in loading an interstate or foreign vessel. Cf. Baltimore & O. S. W. R. Co. v. Burtch, 263 U. S. 540. The longshoremen busied in the same task bears the same relation as the crew to the commerce that he serves. Indeed, for the purposes of the Merchant Marine Act (41 Stat. 988, 1007), a stevedore is a 'seaman.' International Stevedoring Co. v. Haverty, 272 U. S. 50. A stipulation in the record tells us that any serious interruption in the service of such cargo handlers cripples at once the activities of a port and slows down and obstructs the free and steady flow of commerce. We might take judicial notice of the fact if the stipulation were not here."

In the case of Joseph vs. Carter and Weeks Stevedoring Company, the court while following the Puget Sound Stevedoring Company case, used the following language which is significant in support of the distinction which it is sought to draw in this discussion. And after reviewing the case of American Manufacturing Co. vs. St. Louis and the Berwin-White case, which has heretofore been discussed in the briefs of the appellant, the court used the following language:

"Though all of these cases were closely related to transportation in commerce both in time and movement, it will be noted that in each there can be distinguished a definite separation between the taxable event and the commerce itself. We have no reason to doubt the soundness of their conclusions.

"Stevedoring is more a part of the commerce than any of the instances to which reference has just been made. Although state laws do not discriminate against interstate commerce or in actuality or by possibility subject it to the cumulative burden or multiple levies, these laws may be unconstitutional because they burden or interfere with commerce. See Southern P. Co. v. Arizona, 325 U. S. 761, 767, 89 L. Ed. 1915, 1823, 65 S. Ct. 1515. Stevedoring, we conclude, is essentially a part of the commerce itself and therefore a tax upon its gross receipts or upon the privilege of conducting the business of stevedoring for interstate and foreign commerce, measured by those gross receipts, is invalid. We reaffirm the rule of Puget Sound Stevedoring Company. 'What makes the tax invalid is the fact that there is interference by a State with the freedom on interstate commerce.' Freeman v. Hewit, supra (-US-, ante 210, 67 S. Ct. 274)."

While I have apparently allowed myself to be "led far afield," in that I have discussed many cases cited by the attorneys for the appellant, that in my opinion have no bearing on the case presented by this record, I have done so only in aid of the Court in distinguishing such cases from the case at bar. And I therefore shall confine my further discussion to the simple question involved in this case.

There is no denial by the appellant that the only taxes demanded and paid by it were computed upon amounts received as compensation for services performed wholly within the state. And that it not only did not contract to transport oil beyond the borders of the state, but at the time the service was performed had no facilities, nor contractural relation with any carrier equipped to transport the oil beyond the borders of the state.

When these facts are considered in connection with the statute under which the Sales Tax was collected, Section 10109 of the Code of 1942, it is apparent that the question of whether or not the activities performed within this state by the appellant might ultimately be considered as connected with interstate commerce, for some purposes, such a conclusion would have no application to the provisions of the statute, which provides:

> "Upon every person engaging or continuing within this State in the business of operating a pipe line for transporting from one point to another in this State oil or natural gas or artificial gas through pipes or conduits in this State, there is likewise hereby levied and shall be collected a tax, on account of the business engaged in, equal to two per cent of the gross income of the business."

It will be noted that the statute quoted definitely imposes a tax upon any person operating a pipe line for transporting from one point to another in the State oil or natural gas, or artificial gas through pipes or conduits in this State. Which provision is identical with the provisions of the other six paragraphs in said section, imposing taxes on public service corporations performing services within the State. And no question would be raised by this, if it were not for the proviso contained in

the last paragraph of said section, which allows a deduction from the gross income of any such businesses of the amounts received if a business is also conducted in commerce between this State and other States of the United States, or between this State and foreign countries. And in explanation of the meaning of said proviso, the statute further provides "which the State of Mississippi is prohibited from taxing under the Constitution of the United States of America."

It is manifest that the statute is intended only to impose taxes on local activities, and in the application of said statute to the several forms of business taxed by the same section, telegraph companies, which are engaged in both interstate and intrastate business, pay the tax on all messages transported between points within the State. Telephone companies, although engaged in both interstate and intrastate pay this tax on all messages transported from one point in the State to another point within the State. Railroad companies transport freight and passengers, both interstate and intrastate, pay the tax on all freight and passengers transported from one point within the State to other points within the State. Sleeping car companies, though engaged in both interstate and intrastate business, pay the tax on all fares received from passengers transported from one point within the State to other points within the State. Express companies, which do both interstate and intrastate business, pay the tax on all amounts received for transporting merchandise from one point within the State to other points within the State. Bus companies, although doing both interstate and intrastate business, pay the tax on all fares received for transportation of passengers or freight from one point in the State to other points within the State.

In view of this uniform acceptation of the meaning of the statute for all other public service companies which actually do an interstate business as well as an intrastate business, I can see no reason why a concern which had no facilities for, and engaged in no other business whatever than the transportation of oil as a common carrier between one point in the State to another point within the State should claim immunity from the tax merely on the theory that the oil transported by them ultimately was carried beyond the State line by an interstate carrier, with which the appellant had no contractual relation nor received any compensation for any part of the movement of the oil for its actual transportation from a point within the State to a point beyond the State.

A great deal has been said in the brief of the attorneys for the appellant as to the language "which the State of Mississippi is prohibited from taxing under the Constitution of the United States of America," but I insist that this provision is merely explanatory of the fact that the legislature did not seek to impose a tax other than for strictly local activity, and emphasized this fact by writing in this additional explanation of the purpose of the statute.

Not conceding that the activity of this appellant is any part of interstate commerce, but for the sake of argument, I suggest that even though for some purposes it might be considered as a link in interstate movement, even then, according to the language of the Mississippi Court as used in the case of Stone v. General Electric Contracts Corporation, 193 Miss. 317, the State would not be prohibited in collecting the kind of tax imposed on strictly local activities, as indicated by the following language of the Court in said case:

"It has often been observed in times past that interstate commerce should pay its way, should be made to bear a fair share of the cost of local government whose protection it enjoys, but outside of ad valorem taxes and until recently most efforts to make it pay its way have met with failure. In late years, however, there is a tendency to uphold local taxation when it does not bear directly upon interstate commerce as commerce, or when indirect, it has no substantial effect to block or impede the freeflow of such commerce."

This language of the Mississippi Court was used as expressing the adoption by said Court of the principle laid down in the case of Stone v. Interstate Natural Gas Company, reported in 103 Federal 2d at page 544, and affirmed by the Supreme Court of the United States in 308 U. S., 522. The language of the Court in said last mentioned decision which was adopted and subscribed to by this Court being as follows:

"A basic principle is that taxation is vital both to the State and national governments; to be concurrently exercised by both with as little interference as possible by one with the other. Another basic principle is that immunity from taxation ought to be jealously regarded. It is well settled that a total or partial exemption claimed under a private charter or other legislative contract cannot rest on implication, but only on express words which are free from reasonable doubt. An implication of immunity based on constitutional provisions ought to be a necessary implication, and to extend no further than the necessity requires; and this especially when the immunity is invoked not in behalf of the government but of a citizen or private corporation. It is clear also that

because a matter is regulable only by one government it is not thereby exempted from just taxation by the other. No one supposes that because intrastate commerce and most other businesses are regulable by the State that the national government may not properly tax them and those engaged in them. Federal taxes were from the beginning placed on liquors and tobacco and the production and the local handling of them. Conversely, the clause of the Federal Constitution vesting exclusive power to regulate interstate and foreign commerce in Congress ought not of itself to exempt such commerce and those who carry it on in a State from a decent and non-discriminatory State taxation. Impairment of the commerce power of Congress really arises only if the State by intention or in actual effect regulates commerce by license or other special taxation, or burdens it unduly so as to impede it; or if the State law imposing the tax conflicts with some regulation made by the Congress in its supreme right."

CONCLUSION

In conclusion, I respectfully submit, that the activity engaged in by the appellant, for which it received compensation upon which the tax in question was computed and paid, consisted wholly and only of transporting oil . . . "from one point to another in this state . . . through pipes or conduits *in this state*," which is the exact business upon which the tax was imposed and paid.

The appellant contends, however, that it should not have been required to pay the tax, because a general provision of the statute authorizes an exception from the gross income of the several activities taxed by said section, where both interstate and intrastate business is engaged in, such as railroads, telegraph and telephone, express, bus lines and any other such businesses known to be engaged in both interstate and intrastate commerce,

> "so much thereof as is derived from business conducted in commerce between this state and other states of the United States and foreign countries."

There is a qualifying proviso even to this provision, which must be

> "which the State of Mississippi is prohibited from taxing under the Constitution of the United States of America."

The next thing that I would bring to the attention of the Court is that there is no contention by the appellant that it in any sense transported oil beyond the State line and was not the agent of the interstate carrier to which it delivered the oil, but on the other hand, was the instrumentality through which the owner of the oil entered into a contract with an interstate carrier by which the oil was

to be transported from points within this state to points beyond this state.

The Mississippi Court having had an opportunity to consider all the authorities cited in the brief of the appellant, as well as those cited in this brief, and having concluded that the taxes were due and properly paid, then I adopt literally the language of the Supreme Court of Mississippi as the same appears in the printed record in this Court, beginning with the third paragraph on page 48 of the printed record and continuing through and including page 58 of the printed record. And since the reasoning set out in said opinion is so logical and cogent, I do not deem it necessary to do other than call this Court's attention to the language of the Supreme Court of Mississippi, as contained in said opinion as the best argument that can be used in support of the opinion of the Mississippi Court.

I therefore respectfully submit that the decision of the Supreme Court of Mississippi was eminently correct, and that the decision of said Court should be affirmed by this Court.

Respectfully Submitted:

J. K. Sumrall

Attorney for the Appellee

CERTIFICATE

I hereby certify that I have this day mailed postpaid to the attorneys of record for the appellant a true copy of the foregoing brief, this 23rd day of December, 1948.

Attorney for the Appellee

Petition of the Appellant for a Rehearing

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No. 287

In the Supreme Court of the United States

October Term, 1948.

INTERSTATE OIL PIPE LINE COMPANY,
Petitioner (Appellant),

vs.

A. H. STONE, CHAIRMAN, STATE TAX COMMISSION.

PETITION OF THE APPELLANT FOR A REHEARING.

VILLARD MARTIN,
JOSEPH L. SEGER,
PHELAN H. HUNTER,
FRANK R. CLARK, JR.,
GARRETT LOGAN,
JAMES A. ALEXANDER,
Attorneys for Appellant.

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IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1948.

No. 287

INTERSTATE OIL PIPE LINE COMPANY,

Petitioner (Appellant),

vs.

A. H. STONE, CHAIRMAN, STATE TAX COMMISSION.

PETITION FOR REHEARING.

Comes now the above named Interstate Oil Pipe Line Company, and presents this, its petition for a rehearing of the above entitled cause, and, in support thereof, respectfully shows:

1. The Court erred in affirming the judgment of the Mississippi Supreme Court on the ground that the State of Mississippi had the power to levy on interstate commerce the tax in question when the State of Mississippi has legislatively, administratively and judicially determined that interstate commerce is exempt from the tax, which construction is binding upon this Court. A determination that Mississippi has the *power* to impose such a tax on interstate commerce does not decide this case unless the power has been exercised and the record clearly shows that Mississippi has not sought to apply the tax to interstate commerce, but has specifically exempted such commerce from its application.

The statute involved contains the following provision:

"There shall be excepted from the gross income used in determining the measure of the tax imposed in this section so much thereof as is derived from the business conducted in commerce between this state and other states of the United States, or between this state and foreign countries which the State of Mississippi is prohibited from taxing under the Constitution of the United States of America."

—Mississippi Code 1942, Ann., Title 40, c. 3, par. 10109.

Appellee admits in his brief to this Court in this case that he has construed the exemption clause set out hereinabove to apply to all interstate commerce whether or not the State of Mississippi was prohibited from taxing it under the Constitution of the United States. His brief states at page 46:

"A great deal has been said in the brief of the attorneys for the appellant as to the language 'which the State of Mississippi is prohibited from taxing under the Constitution of the United States of America,' but I insist that this provision is merely explanatory of the fact that the legislature did not seek to impose a tax other than for a strictly local activity, and emphasized this fact by writing in this additional explanation of the purpose of the statute."

If this statement should leave in the minds of the Court any doubts as to the administrative construction placed on this statute by those charged with its enforcement they should be fully dispelled by the following statement quoted from page 32 of appellee's brief to this Court:

"Since Point B in the brief of the attorney for the appellant deals only with the question of the right of the state to tax interstate commerce, I do not deem

it necessary to dwell at length on this point in the brief of the attorneys for the appellant and *there is no effort on the part of the appellee to contend that any tax is imposed by the laws under consideration, if the appellant was actually engaged in interstate commerce as contemplated by such statute.*" (Emphasis supplied.)

This unequivocal and long-established administrative construction of the Mississippi statute by those charged with its enforcement is supported by the construction placed on the statute by the Mississippi Supreme Court in the instant case when it states:

> "* * * by thus excepting from the gross income used in determining the measure of the tax so much thereof as is derived from business conducted in commerce between this and other states 'which the State of Mississippi is prohibited from taxing under the Constitution of the United States of America' it was made known that it was not the purpose of the legislature to attempt to burden interstate commerce as such by the levy of a tax measured by a per cent of the gross income derived therefrom."
>
> —35 So. (2d) 77; Tr. 49.

The Mississipi Supreme Court, commenting further on the clause of its statute exempting interstate commerce, refers to shipments from producing leases to out-of-state destinations by interstate trunk pipe lines on a continuous journey or by railroad from local shipping points within the state, 35 So. (2d) 77, Tr. 50, and says:

> "If by the former method, it would of course constitute that character of commerce 'which the State of Mississippi is prohibited from taxing under the Constitution of the United States' and this would be equally true as to the movement by rail of oil from a local shipping point to its destination outside the State in cross-

ing the state line. Hence, the statute was designed only for the purpose of taxing the privilege of operating a pipe line for transporting the oil from one point to another in the state where it is then delivered to an interstate carrier *prior to beginning of its ultimate passage to a foreign state in interstate commerce.*" (Emphasis supplied.)

As pointed out in the opinion of Mr. Justice RUTLEDGE:

> "The State Supreme Court held that the operation of these pipe lines between points within the state was intrastate rather than interstate commerce, and that the tax was therefore 'merely on the privilege of operating a pipe line wholly within this state as a local activity. * * * a tax on the privilege of doing an intrastate business, and measured by a per cent of gross income as a matter of convenience'."

The rule that the construction of a state statute by the highest court of that state is binding on this Court is expressly affirmed in the opinions of both the majority and the dissenting justices of this Court in the decision of this case. However it is just as firmly established that the determination of what is and what is not interstate commerce is strictly a federal question which this Court should decide independently of the decision of the state court since the construction of the Constitution of the United States is the exclusive prerogative of the federal courts. *Southern Gas Corp.* v. *Alabama,* 301 U. S. 154; *Hooven and Allison Co.* v. *Evatt,* 324 U. S. 652, 658; *Caldarola* v. *Eckert,* 332 U. S. 155, 158; *Standard Oil Co.* v. *Johnson,* 316 U. S. 481, 483.

In the opinion of Mr. Justice RUTLEDGE, joined by Mr Justice BLACK, Mr. Justice DOUGLAS and Mr. Justice MURPHY, it is stated:

> "We do not pause to consider whether the busi-

ness of operating the intrastate pipe lines is interstate commerce for, even if we assume that it is, Mississippi has the power to impose the tax involved in this case."

The exemption of interstate commerce from tax in the Mississippi statute as construed by its administrative officials and its courts clearly distinguishes this case from *Maine* v. *Grand Trunk R. Co.*, 142 U. S. 217, and *Central Greyhound Lines* v. *Mealey*, 334 U. S. 653, on which Mr. Justice RUTLEDGE and the three other justices who join him rely, as well as from *Memphis Natural Gas Co.* v. *Stone*, 335 U. S. 80, for in all of those cases the state was attempting to apply the tax to activities admittedly in interstate commerce, while here the State of Mississippi has seen fit to exempt interstate commerce and has assessed the tax under the mistaken view that the activities here concerned are intrastate commerce. The opinion of Mr. Justice RUTLEDGE, *et al.*, would force the State of Mississippi to collect the tax on interstate commerce which it has expressly exempted and has never sought to tax. It therefore becomes necessary for this Court to determine whether the activities of appellant herein were interstate or intrastate commerce, a strictly federal question, and since the four justices who joined in the dissenting opinion of Mr. Justice REED agree that they were interstate commerce and the four justices whose opinion is set out by Mr. Justice RUTLEDGE have not expressed themselves on this point it is entirely possible and even probable that some or all of the latter group, if rehearing were granted, would construe these activities as interstate commerce. If even one of this group should so hold the judgment of the Mississippi court should be and would be reversed and the case remanded for judgment in favor of appellant.

This point was not fully covered in the appellant's brief but was discussed in oral argument of the case before the Court on January 13, 1949. Inasmuch as only eight members of the Court were present at the oral argument, while all nine members have joined in the decision of this case it is respectfully submitted that in view of the importance of the issue involved and the narrow margin of the decision it should be reconsidered and the case be assigned for rehearing and reargument before the entire bench.

2. As regards the power of the State of Mississippi to impose a privilege tax on the business of engaging in interstate transportation, the judgment of the Court in this case affirms the judgment of the Mississippi Supreme Court without majority concurrence on the reasons for the judgment. The opinion of four justices as expressed by Mr. Justice RUTLEDGE would repudiate the rule laid down by a majority of the present Court in *Joseph, et al., v. Carter & Weekes Stevedoring Co.*, 330 U. S. 422, which expressly approved and reaffirmed the decision of the Court in *Puget Sound Stevedoring Co.* v. *Tax Commission*, 302 U. S. 90, to the effect that a state or local tax on the privilege of engaging in interstate commerce measured by gross receipts therefrom is void as repugnant to the Commerce Clause of the Constitution of the United States, even though the tax does not discriminate as between interstate and intrastate commerce and even though the activities subjected to tax are entirely within the district imposing the tax. If these cases are not to be followed we respectfully submit that appellants and the Bar are entitled to a clear statement as to the reasons therefor. They should be either distinguished from the case at bar or expressly overruled and if overruled it should be by concurrence of a majority of the Court, so that all may be advised as to the law on this important matter.

3. The concurring opinion of Mr. Justice BURTON holding the Mississippi tax in question valid on the grounds that the appellant's activities were intrastate rather than interstate commerce raises serious questions as to whether said activities are properly subject to federal regulation under such statutes as the Interstate Commerce Act. In the absence of explanation as to the reasoning which led to this conclusion appellant is at a loss to know how it should determine in similar situations in the future what is and what is not interstate commerce in Mr. Justice BURTON's judgment without bringing to this Court each separate factual situation that may arise, which would be a costly procedure for appellant and would unnecessarily tax the time of this and the lower courts by multiplying litigation. The principles governing the determination of interstate transportation as distinguished from intrastate transportation have been well established by this Court in decisions in similar situations to that involved herein including the recent cases of *Joseph* v. *Carter & Weekes*, 330 U. S. 422; *Richfield Oil Corporation* v. *State Board of Equalization*, 329 U. S. 69; and *Interstate Natural Gas Co.* v. *Federal Power Commission*, 331 U. S. 682, decided by the present Court, in all of which decisions Mr. Justice BURTON concurred. If the facts of this case distinguish it from the cases referred to or if the principles laid down therein are no longer controlling appellant is entitled to a delineation which may serve as a guide in determining whether similar operations in the future are interstate or intrastate commerce. Furthermore it is entitled to know whether a majority of the Court share Mr. Justice BURTON's views on this important question.

Conclusion.

Appellant finds after careful study of the opinion rendered in this case that a majority of the Court apparently agrees with all of the legal propositions on which its appeal was based, as follows:

(1) At least eight justices expressly and probably all nine agree that the construction of the Mississippi statute by the Supreme Court of that state (which exempts interstate commerce from the tax) is binding upon this Court.

(2) At least four justices expressly and perhaps as many as eight justices agree that appellant's activities in question were interstate commerce rather than intrastate commerce.

(3) Five justices agree that Mississippi does not have the power to impose on the privilege of engaging in the business of interstate transportation a tax measured by a percentage of gross receipts as attempted here.

The importance of the issues involved in this case, the wide divergence of views as to the reason for the decision, the close margin by which the case was decided and the further fact that one of the justices voting to affirm the judgment of the Mississippi court was not present at the oral argument of the case are believed to justify a reconsideration of the judgment.

For the foregoing reasons it is respectfully urged that this petition for a rehearing be granted, and that the judg-

ment of the Mississippi Supreme Court be, upon further consideration, reversed.

Respectfully submitted,

VILLARD MARTIN,
JOSEPH L. SEGER,
PHELAN H. HUNTER,
FRANK R. CLARK, JR.,
GARRETT LOGAN,
JAMES A. ALEXANDER,
Attorneys for Appellant.

CERTIFICATE OF COUNSEL.

I, ..., counsel for the above-named Interstate Oil Pipe Line Company, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

.....,
Counsel for Interstate Oil Pipe Line Company.

A copy of the above and foregoing petition for appellant has been mailed, postpaid, to J. H. Sumrall, attorney for A. H. Stone, Chairman State Tax Commission, appellee, this 27th day of June, 1949.

.....,
Of Counsel for Appellant.